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THE UNBEARABLE LIGHTNESS OF TITLE UNDER THE UNIFORM COMMERCIAL CODE

WILLIAM L. TABAC*

INTRODUCTION

In the mind's eye, "title" to property conjures up sweeping visions of ownership.¹ So it did in the minds of the common-law judges. Generations of law students envisioned it as the fabled stockpile whose holder could sell the entire bundle outright or part with each twig piecemeal, happily, say, to a lessee, or woefully, to a judgment lien creditor.

Title was also the polestar that guided the development of property law into the twentieth century. Today, however, it is dimmed in the legal if not in the lay consciousness. While it continues to flourish in real property law, the rules governing personal property have taken quite a different turn. Under the Uniform Commercial Code,² which regulates bargained-for interests in personal property, the focus has shifted from title to contract and its ideas of mutual assent.³

The Code's drafters expressly rejected title theory for transactions in goods.⁴ They felt the concept was analogous to scattershot

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1. Ownership is "a collection of rights to use and enjoy property, including the right to sell . . . it. The *jus disponendi* (right of alienation) is an essential element of property." 63 AM. JUR. 2D *Property* § 30 (1964). "[T]he right of possession depends on ownership . . ." *Rick v. Boegel*, 205 N.W.2d 713, 716 (Iowa 1973). "In the legal sense . . . property means not the thing itself, but the rights which inhere in it. Ownership, or the right of property is, moreover, not a single indivisible concept but a collection or bundle of rights, of legally protected interests." R. BROWN, *THE LAW OF PERSONAL PROPERTY* § 5, at 6 (2d ed. 1955).

2. All references to the U.C.C. are to the UNIFORM COMMERCIAL CODE 1989 OFFICIAL TEXT AND COMMENTS (West 11th ed. 1990), unless otherwise indicated.

3. See *infra* note 7 and accompanying text.

4. See U.C.C. § 2-401 ("Each provision of this Article with respect to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title."); § 9-202 ("Each provision of this Article with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor."). See also *Evans Prods. Co. v. Jorgensen*, 245 Or. 362, 365, 421 P.2d 978, 980 (1966) ("Under the UCC, title is not the talisman."); U.C.C. § 2A-302 (Proposed Final Draft).

from a blunderbuss. To Karl Llewellyn, the legal realist who both stumped for the Code's adoption and played a key role in its drafting, title was both too theoretical and too static a concept to be efficient.⁵ He reasoned that its all-or-nothing approach lacked precision.⁶ The drafters proclaimed that under the new Code, consequences in the marketplace would be determined pragmatically.⁷ The transaction would be ruled as the parties shaped it by their contract, consistent with their expectations, yet sensitive to those of third parties.

As nearly a half century's experience with the Code has shown,

5. See Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L.Q. 159, 165-69 (1938).

To a silly issue no sane answer is possible. This one we currently pose thus: Has title passed? and solve by locating a mythical—or should I say more accurately 'mystical'?—essence known as title, which is hung over the buyer's head or the seller's like a halo. Halos are, it appears, indivisible. And there is only one halo for buyer and seller to make out with.

Id.

6. See *id.* at 169.

The approach of prevailing sales doctrine, before or apart from the [Uniform Sales] Act and in it, is this: Unless a cogent reason be shown to the contrary, the location of title will govern every point which it can be made to govern. It will govern, between the parties, risk, action for the price, the applicable law in an interstate transaction, the place and time for measuring damages, the power to defeat the other party's interest, or to replevy, or to reject; it will govern, as against outsiders, leviability, rights against tort-feasors, infraction of criminal statutes about sales, incidence of taxation, power to insure. The burden is put upon any individual issue to show why it should be honored by being severed from the Title-lump in any particular, and given individualized treatment. Now this would be an admirable way to go at it if the Title concept (or other basic integrated concept used) had been tailored to fit the normal course of a *going or suspended situation during its flux or suspension*. But Title was not thus conceived, nor has its environment of buyers and sellers had material effect upon it. It remains, in the sales field, an alien lump, undigested. It even interferes with the digestive process.

Id. (emphasis in original).

7. The official comment to § 2-401 provides: "This Article deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract of sale and not in terms of whether or not 'title' to the goods has passed." U.C.C. § 2-401 official comment 1. The official comment to § 9-101 provides:

The aim of this Article is to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty.

....

This Article does not determine whether 'title' to collateral is in the secured party or in the debtor and adopts neither a 'title theory' nor a 'lien theory' of security interests. Rights, obligations and remedies under the Article do not depend on the location of title (Section 9-202).

U.C.C. § 9-101 official comment. But compare this to article 2A, the most recent Code article, which does not contain such a disclaimer.

however, that goal has been frustrated. Courts predictably relied on the drafters' injunctions against using title as a philosopher's stone in resolving Code conflicts.⁸ But the upshot has been considerable uncertainty about how the various Code articles that regulate transactions in goods relate to each other. With the introduction of the new lease article, article 2A, the confusion will increase.

Perhaps the drafters did "protesteth" a bit too much about title. For, despite their disclaimers, ownership principles were apparently very much in their hearts, if not in their eyes, when they wrote the Code. In fact, the centerpiece of article 2 is title. The "sale"—dynamically the transfer of title and also the concept after which article 2 is named—is the article's primary focus. Article 9, which regulates security interests, deals with a mere fragment of ownership. Yet, the current Code thinkers tend to treat ownership and security interests as fungible Code claims.

This Article will offer the heresy that the transactions in goods that the Code regulates are still firmly grounded on ownership principles and that these principles must be reckoned with to fulfill the Code's design. It is therefore important first to identify the various property interests in goods that one can obtain under the Code and determine how the Code ties these interests to title.

I. TITLE, SECURITY, AND LEASEHOLD INTERESTS IN GOODS

In exploiting goods, an owner may barter away rights that range from naked possession to complete control of the property. Along with outright sales, the Code covers a wide array of bargained-for interests in goods.

Article 2 of the Code regulates sales of goods.⁹ At its core is title. A "sale" under article 2 is the transfer of "title" to goods from a "seller" to a "buyer" in exchange for a price.¹⁰ "Title" under the Code means ownership.¹¹ Article 2 simply governs the transfer of

8. See, e.g., *Wilson v. Gear*, 110 Ill. App. 3d 538, 442 N.E.2d 670 (1982) (antiquated concepts of "title" do not control); *Hayward v. Postma*, 31 Mich. App. 720, 188 N.W.2d 31 (1971); *Hughes v. Al Green, Inc.*, 65 Ohio St. 2d 110, 418 N.E.2d 1355 (1981); *Evans Prods. Co. v. Jorgensen*, 245 Or. 362, 365, 421 P.2d 978, 980 (1966).

9. See U.C.C. § 2-101. "This Article shall be known . . . as Uniform Commercial Code—Sales." See also *id.* § 1-109. Although § 2-102 provides that article 2 "applies to transactions in goods," its particular provisions focus on sales. See, e.g., *id.* § 2-106 (limits "contract" and "agreement" to sales).

10. See *id.* § 2-106(1).

11. The goods articles are replete with references to title and ownership. In article 2, see *id.* §§ 2-106, 2-312, 2-327(1)(a), 2-401, 2-403(1), 2-722(a) (title); §§ 2-602(2)(a), 2-606(1)(c) (ownership). In article 2A, see *id.* §§ 2A-302, 2A-304(1), 2A-309(4), (5), (7),

ownership of goods in sales transactions.

Article 2A regulates "leasehold" interests in goods.¹² One of these interests is the possession and use for a specified term that a "lessee"¹³ acquires under a "lease."¹⁴ The other interest is the "lessor's" title to the goods.¹⁵ When a lease terminates, the lessor reacquires from the lessee whatever remains of the property.¹⁶

In the article 9 secured transaction, the "debtor"¹⁷ either has ownership rights in the goods or has the right to use the goods as collateral.¹⁸ The remaining Code property interest in the goods is the "security interest."¹⁹ The security interest is held by the "secured party"²⁰ who will have even fewer rights to the goods than a lessee. Although the secured party may have the right to possess the goods, normally there is no accompanying right to use them.²¹ In fact, the secured party's right to exploit the goods in any respect will be contingent upon a breach of the "security agreement" by the

(8) (owner). In article 9, see *id.* §§ 9-102(2), 9-202 (title); §§ 9-105(1)(d), 9-112, 9-314(4) (owner).

The Code uses "title" and "property" interchangeably. See, e.g., *id.* § 2-401(1). The English, however, distinguish between them. Under the English Sale of Goods Act, 1979, ch. 54, "property" means the totality of a seller's rights over an object. "Title" denotes absoluteness. See Fridman, *Should Commonwealth Countries Adopt Article 2 of The Uniform Commercial Code? An English View in ASPECTS OF COMPARATIVE COMMERCIAL LAW* 18, 21 (J. Ziegel & W. Foster eds. 1969).

12. See U.C.C. § 2A-102 ("This Article applies to any transaction, regardless of form, that creates a lease.").

13. See *id.* § 2A-103(1)(n).

14. See *id.* § 2A-103(1)(j).

15. See *id.* § 2A-103(1)(p).

16. The remainder is the "residual interest." See *id.* § 2A-103(1)(q).

17. See *id.* § 9-105(1)(d).

18. Article 9 debtors may both "own" and have "rights" in the collateral. See *id.* Where collateral is not owned by the debtor, the owner must authorize the debtor's use of the goods as collateral. See *Towe Farms Inc. v. Central Iowa Prod. Credit Ass'n*, 528 F. Supp. 500, 505 (S.D. Iowa 1981). In such cases, the owner of the goods will also be a "debtor" and the secured party will be required to inform the owner of any actions that will affect the goods. See U.C.C. § 9-112.

19. U.C.C. § 1-201(37).

20. See *id.* § 9-105(m).

21. The secured party takes possession of the goods pending the performance of the security agreement. See *id.* § 9-203. When goods are not pledged as security, the secured party's right to possess them is contingent upon the debtor's default. See *id.* §§ 9-501, 9-503, 9-504. In either case, while the goods are in the secured party's possession, the secured party must use reasonable care to protect the goods. *Id.* § 9-207(1). This duty, moreover, may not be disclaimed. See *id.* § 1-102(3). If, both before and after default, the secured party fails to protect the debtor's ownership interest in the goods, the secured party may be liable to the debtor for conversion. See *id.* §§ 9-207(3), 9-507(1); *Towe Farms*, 528 F. Supp. at 506-07. See also R. HENSON, *SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* 10-7 (2d ed. 1979).

debtor.²²

Under the Code, the secured party's and lessee's interests are a far cry from ownership. These limited Code claims are based instead on the strength of the lessor's or debtor's rights to the goods.²³ Because of this, they are said to be "derivative" claims that can rise no higher than whatever rights the lessor or debtor has in the goods.²⁴

The following is a review of the various rights to goods that arise in an article 2 sale.

II. CODE PROPERTY INTERESTS IN CONTEXT: AN ARTICLE 2 TRANSFER OF TITLE AND ITS EFFECTS ON SECURITY INTERESTS AND LEASES

As aspects of title, the derivative Code interests in goods will often change with the title. The following example illustrates the movement of title under an article 2 sale of inventory²⁵ and the effect of that movement on lease and security interests under articles 2A and 9.

ABC Corporation is a manufacturer of furniture. First Bank is ABC Corporation's secured lender, a "floorplanner"²⁶ under an ar-

22. See U.C.C. §§ 9-503, 9-504.

23. See *id.* §§ 9-203(1)(c), 2A-103(1)(j). Section 9-202 appears to suggest to the contrary for security interests. It provides that "each provision of this article with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor." According to the official comment, however, the reference to the secured party's "title" is to prior law under which mortgagees took title to collateral. See *id.* § 9-202 official comment.

24. "[Derivative rights] limit a person's ability to transfer or encumber property to the interest which the person possesses." Comment, *UCC: Article 2A—Leases: Structuring Priorities of Claimants to Leased Property*, 73 MINN. L. REV. 208, 218 (1988). The "*nemo dat [quod non habet] principle*" pervades the Code." It underlies the "first in time, first in right" rule, which means that "the person who takes rights second in time can take only those rights that remain after the first taker has taken his rights." Harris, *The Rights of Creditors under Article 2A*, 39 ALA. L. REV. 803, 807-08 (1988). The debtor may, however, have a "power" to convey rights. *Id.* at 808 n.14.

25. See U.C.C. § 9-109(4), which provides that "[g]oods are 'inventory' if they are held by a person who holds them for sale or lease or to be furnished under contracts for service or if he has so furnished them, or if they are raw materials, work in process or materials used or consumed in a business." *Id.*

26. The term customarily refers to financing a dealer purchase of automobiles, see J. HONNOLD, *CASES AND MATERIALS ON THE LAW OF SALES AND SALES FINANCING* 490 (5th ed. 1984), but it generally refers to any financing of inventory under an after-acquired property clause. See B. CLARK, *THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* ¶ 10.5[3], at 10-35 to -36 (1980).

ticle 9 security agreement. Under this written agreement,²⁷ First Bank advances ABC Corporation money in order to purchase inventory, and ABC Corporation will use this inventory as collateral for the loan. As is customary under such agreements, First Bank will take a security interest in "all equipment"²⁸ and inventory owned²⁹ or hereafter acquired"³⁰ by ABC Corporation.

Because security agreements tend to be complex, ABC Corporation and First Bank will be represented by counsel during their negotiations.³¹ The security agreement may or may not provide for future advances by the bank,³² but it will undoubtedly impose upon ABC Corporation obligations to insure and protect the collateral or proceeds generated by the collateral.³³ It will also specify the events constituting "default"³⁴ and First Bank's rights to exploit the collat-

27. In nonpledge secured transactions, the debtor must sign a security agreement that describes the collateral. *See* U.C.C. § 9-203(1)(a).

28. "Goods are 'equipment' if they are used or bought for use primarily in business (including farming) or a profession or by a debtor who is a non-profit organization or a governmental subdivision or agency." *Id.* § 9-109(2).

29. Accountants use ownership to measure inventory claims. *See* 4 AICPA, CCH PROFESSIONAL STANDARDS ¶ 9005.10.

30. U.C.C. § 9-204(1) provides that the security agreement may contain an "after-acquired" property clause, popularly known as a "floating lien" because it "floats over both existing and after-acquired property of the debtor." J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* § 23-6, at 1095 (3d ed. 1988). The clause can be far-reaching. "It is possible for a term loan to be secured by whatever assets may happen to be lying around at the time of default" G. GILMORE, 1 *SECURITY INTERESTS IN PERSONAL PROPERTY* § 11.7, at 359 (1965). In describing the after-acquired property clause, the leading Code commentators find ownership principles useful. It "'floats' over all of [the] debtor's present and future assets." *Id.* "Such a clause extends the creditor's security interest to property acquired after an initial loan as well as to property then owned by the debtor." J. WHITE & R. SUMMERS, *supra*, at 1095. Indeed, the secured party is likely to bargain for a warranty that the debtor "owns" the after-acquired collateral. R. HENSON, *supra* note 21, at 351.

31. "This comprehensive contract between the parties includes language evidencing not only the bank's continuing security interest . . . but also authorizing the bank to sign notes and security agreements necessary to perfect it." J. HONNOLD, *supra* note 26, at 493.

32. *See* U.C.C. § 9-204(3).

33. "'Proceeds' includes whatever is received upon the sale, exchange, collection or other disposition of the collateral or proceeds." *Id.* § 9-306(1). A secured party's claim to proceeds is, unless otherwise agreed, automatic. It need not be spelled out in the security agreement. *See id.* § 9-203(3).

34. Default is not defined under article 9. It is "whatever the security agreement says it is." G. GILMORE, *supra* note 30, at 1193. Defining default is left "to the parties and to any scraps of common law lying around" as well as "the modest limitations imposed by the unconscionability doctrine and the requirement of good faith." J. WHITE & R. SUMMERS, *supra* note 30, at 1084. "The primary event of default will be a failure to make required payments to the secured party in accordance with the schedule agreed upon." R. HENSON, *supra* note 21, at 350. "Beyond this point, the events of default vary depend-

eral if such events occur.

XYZ Corporation is a major retail outlet in the business of selling and leasing furniture to its customers. Second Bank, its floor-planner under another comprehensive article 9 secured transaction, also specifies as collateral for its loan "inventory and equipment now owned and hereafter acquired" by XYZ Corporation.

XYZ Corporation wants to buy inventory from ABC Corporation. XYZ Corporation may use cash furnished by Second Bank to purchase the inventory, or ABC Corporation may extend open credit to XYZ Corporation. In either case, the informal sales contract will be quite different than the detailed security agreement previously described.

The following scenario is a familiar one to merchants. On Monday, XYZ Corporation mails ABC Corporation one of its form purchase orders for a dozen lamps. On Thursday, ABC Corporation receives XYZ Corporation's purchase order and responds by packaging the lamps, inserting its form invoice, and hauling the lamps to a common carrier for delivery to XYZ Corporation. Upon receipt of the lamps, XYZ Corporation pays for them with its personal check.

Unlike the security agreement, the essential terms did not come from the writings of ABC Corporation and XYZ Corporation. No written sales agreement was ever executed.³⁵ Still, a binding contract of sale was formed under article 2 when ABC Corporation shipped the lamps in response to XYZ Corporation's order.³⁶ If any essential terms were left unspecified, article 2's gap-filler provisions supplied them.³⁷ If written terms conflicted, section 2-207 resolved

ing on the kind of collateral, whether the transaction is purchase money or not, the debtor's business (if the debtor is not a consumer) and so on." *Id.*

35. The security agreement must satisfy more demanding statutes of frauds requirements than the sales agreement. In the absence of a pledge, article 9 requires a written security agreement signed by the debtor. *See* U.C.C. § 9-203(1)(a). *Compare id.* § 2-201(2) (unobjected-to confirmation removes the bar against a merchant recipient). Under pre-Code law, some oral nonpledge secured transactions were saved by the equitable mortgage doctrine, which, like promissory estoppel, provided an exception to the writing requirement. *See White v. Household Fin. Corp.*, 158 Ind. App. 394, 302 N.E.2d 838 (1973). *But see Warren Tool Co. v. Stephenson*, 11 Mich. App. 274, 161 N.W.2d 133 (1968). Equitable mortgage was repudiated by the Code's drafters for article 9. *See* U.C.C. § 9-203 official comment 5; G. GILMORE, *supra* note 30, § 11.4, at 345-46. Estoppel has survived, however, under article 2. *See, e.g., Warder & Lee Elevator, Inc. v. Britten*, 274 N.W.2d 339, 342 (Iowa 1979) (U.C.C. does not displace the doctrine of estoppel).

36. The shipment by ABC Corp. was "a definite and seasonable expression of acceptance" of XYZ Corp.'s offer. *See* U.C.C. § 2-207(1).

37. *See generally id.* §§ 2-307 to -309 (delivery terms), 2-310, -511 (payment terms), 2-

the conflict.³⁸ Representatives of ABC Corporation and XYZ Corporation never met face to face or reduced an agreement to writing. Nor were they represented by counsel. The formation of this sales contract was left to informal mercantile customs and usages that evolved over centuries.

Because ABC Corporation received payment, XYZ Corporation now has unconditional ownership rights in the lamps. XYZ Corporation may exploit this property to the complete exclusion of ABC Corporation. Although First Bank lost its security interest in the lamps,³⁹ it acquired a new security interest in the property that was received in exchange for the lamps: the cash proceeds of the sale.⁴⁰

As the new owner, XYZ Corporation can effectively resell the lamps or lease them to customers. Because XYZ Corporation now owns the lamps, Second Bank, XYZ Corporation's floorplanner, acquires an enforceable security interest in the lamps. Moreover, it would make no difference, if, instead of paying cash, XYZ Corporation had bought the lamps on open credit. ABC Corporation would be the owner of an account receivable that obligates XYZ Corporation to pay cash at a future date, and First Bank would have a security interest in that account.⁴¹

The completed sale just described reflects the continuity of traditional title concepts. A sale, the transfer of the title to the goods for a price,⁴² occurred. The effects of the sale are identical under the Uniform Sales Act,⁴³ which incorporated common-law ti-

305 (price), 2-306 (quantity). *See also id.* § 1-103 (supplemental bodies of law are still applicable unless displaced by particular provisions of the U.C.C.).

The Code includes numerous gap-filler provisions that "taken together constitute a kind of standardized statutory contract." J. WHITE & R. SUMMERS, *supra* note 30, at 129. Compare *Leonard Pevar Co. v. Evans Prods. Co.*, 524 F. Supp. 546 (D. Del. 1981) (warranties of merchantability and fitness for particular purpose implied) with *C. Itoh & Co. v. Jordan Int'l Co.*, 522 F.2d 1228 (7th Cir. 1977) (arbitration clause not implied).

38. U.C.C. § 2-207(2), (3) (additional terms in acceptance or confirmation).

39. As a "buyer in the ordinary course of business," XYZ Corp. would take title to the lamps free of First Bank's security interest. *See* U.C.C. §§ 9-307(1), 1-201(9).

40. U.C.C. § 9-203(3) gives First Bank an automatic claim to proceeds, as defined in § 9-306(1), even though the security agreement does not explicitly mention proceeds.

41. As a species of personal property that the Code regulates, namely, an "account" under U.C.C. § 9-106, XYZ Corporation's duty to pay would be classified as a "non-cash proceed" under article 9. *See* U.C.C. § 9-306(1). Article 9 applies to "security interests" in, as well as "sales" of, accounts. *See id.* § 9-102(1)(a), (b).

42. *Id.* § 2-106(1).

43. The Uniform Sales Act, which was drafted by Professor Samuel Williston, was approved by the National Commissioners on Uniform State Laws in 1906. R. NORDSTROM, *HANDBOOK OF THE LAW OF SALES* § 3, at 4 (1970). Between 1907 and 1941, it was adopted in 36 states and the District of Columbia. *Id.*

the principles, and under the Code, which purports to reject these principles of title.

But the sale might not be completed. The contract might be terminated⁴⁴ or cancelled⁴⁵ for breach. One of the parties might repudiate⁴⁶ the contract or fail to perform properly their obligations. ABC Corporation might tender nonconforming⁴⁷ lamps or XYZ Corporation might bounce the check. In an open credit sale, XYZ Corporation might file for debtor's relief under the Bankruptcy Code.⁴⁸ As a result, XYZ Corporation might never acquire title to the lamps, or, if it does acquire title, ABC Corporation might regain it. In the Code lexicon, which shuns any mention of title, these events might prevent XYZ Corporation from acquiring sufficient "rights"⁴⁹ in the lamps to create enforceable security interests or leases.

A priority contest may then arise between ABC Corporation and someone claiming through XYZ Corporation, a sub-buyer, a lessee, or even XYZ Corporation's secured creditor, Second Bank. These third parties, who may be unaware of the state of XYZ Corporation's ownership of the lamps, may seek to attach their claims to goods purchased by XYZ Corporation.

A fully executed sale of inventory, which transfers unencumbered title to the goods to the buyer and the purchase price to the seller, will protect third parties like these who must attach their claim to the buyer's "rights" in the goods. Indeed, the finality and symmetry of a completed article 2 sale of inventory are compelling in this respect. With the cash or credit commitment in hand, the seller and his secured creditor will have been compensated as called for by their contracts. With indisputable title to the goods now in the buyer, a title which the seller cannot now defeat, the buyer's lessees and secured parties can prevail against any claim to the goods that the seller, or someone claiming through the seller, might

44. "'Termination' occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach." U.C.C. § 2-106(3).

45. *See id.* § 2-106(4). The effect of cancellation is the same as termination except that "the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance." *Id.*

46. *See id.* § 2-610.

47. "Goods . . . are 'conforming' when they are in accordance with the obligations under the contract." *Id.* § 2-106(2).

48. 11 U.S.C. §§ 101-1330 (1988).

49. Under U.C.C. § 1-201(36), "rights" include "remedies," which are defined in § 1-201(34) as "any remedial right to which an aggrieved person is entitled with or without resort to a tribunal." *Id.* § 1-201(34).

make.⁵⁰

Yet, to complete the symmetry, perhaps the converse should also be true. An unpaid cash seller of inventory, who is entitled to reassert title to the goods,⁵¹ should be able to deprive the buyer's secured creditors and lessees of any derivative claims they might have to the goods. Moreover, it would seem that the unpaid credit seller for whom article 2 preserves an ownership claim⁵² should be treated no differently.

But the prevailing Code interpretation rejects these views. In addressing these types of conflicts, the Code pragmatists favor the secured party over the unpaid cash or credit seller of inventory.⁵³ To accomplish this result, however, they had to swap their contract analysis for a quasi-title analysis that protects good faith purchasers of goods from ownership claims.⁵⁴

This Article submits, however, that the article 2 title principles in place under the Code protect unpaid, unsecured sellers from secured lenders and lessees who must, under articles 2A and 9, attach their claims to a buyer's rights to goods. Like their precursors, these principles of title hold that unpaid sellers may recover the goods from their buyers and rescind the sale.⁵⁵ Yet these principles also break with the past: the unpaid seller who can reclaim goods

50. The general rule under article 9 is that a security interest continues in sold goods if it was perfected and the secured party did not authorize the sale. *See id.* § 9-306(2). The § 9-307(1) exception is based on the commercial expectations of the inventory financier and the buyer in the ordinary course of business. "The test [is] . . . whether the sale was ordinary or predictable in the industry." J. WHITE & R. SUMMERS, *supra* note 30, at 1166. Thus, in *Tanbro Fabrics Corp. v. Deering Millikan, Inc.*, 39 N.Y.2d 632, 637, 350 N.E.2d 590, 592-93, 385 N.Y.S.2d 260, 262-63 (1976), a buyer of textiles took free of a security interest in them even though the goods were in the possession of a third party. "In the unlikely . . . event that the secured party does not authorize sales, § 9-307(1) fulfills the reasonable expectation of buyers out of inventory by providing that buyers in the ordinary course take free of the security interest no matter what the secured lender says about sales." Dolan, *The Uniform Commercial Code and the Concept of Possession in the Marketing and Financing of Goods*, 56 TEX. L. REV. 1147, 1189 (1978).

51. *See infra* notes 71, 116.

52. *See* U.C.C. § 2-702(2).

53. *See* Jackson & Peters, *Quest for Uncertainty: A Proposal for Flexible Resolution of Inherent Conflicts Between Articles 2 and 9 of the Uniform Commercial Code*, 87 YALE L.J. 908, 945 (1978); *see, e.g.*, Baird & Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 STAN. L. REV. 175, 195 (1983); Dolan, *supra* note 50, at 1190-92; J. WHITE & R. SUMMERS, *supra* note 30, at § 23-10.

54. *See* Baird & Jackson, *supra* note 53, at 207-08 n.95. "[The contract] argument makes the rights of the finance company . . . turn on a division of ownership rights between two parties that is buried in a contract. We believe that possession by the debtor should always constitute sufficient 'rights in the collateral' for a security interest to attach." *Id.*

55. *See* U.C.C. § 2-702(2).

will be able to defeat secured parties and lessees who must tie their claim to the buyer's rights in the goods.⁵⁶

To see how article 2 title concepts protect the unpaid seller, it is first necessary to describe these principles and their impact on secured parties and lessees who seek to enforce claims to purchased goods.

III. ARTICLE 2 TITLES

By its spirit, if not by its terms, article 2 provides for two basic kinds of title to goods. What the drafters might have called "provisional title" is a temporary title that is dependent upon, and may shift with, the performance of the article 2 contract.⁵⁷ The other article 2 title, which might be called "indefeasible" title, is permanent.⁵⁸

The two kinds of title differ in terms of the "rights"⁵⁹ to goods that they confer on their holders, and hence, on the powers⁶⁰ their holders will have to create the derivative Code claims. A provisional titleholder will generally have insufficient rights to the goods to create effective security interests and leases in third parties.⁶¹ By contrast, an indefeasible titleholder will always have sufficient rights to create these interests in third parties.⁶²

The presence of indefeasible title, and who has it, will ordinarily depend upon the rights and powers that arise under the article 2 contract. The article 2 seller and buyer may agree on when and what kind of title will pass.⁶³ Should they not address title matters,

56. *See id.* § 2-702 official comment 3.

57. *See infra* notes 67-81 and accompanying text.

58. *See infra* notes 83-89 and accompanying text.

59. The *Restatement* view is that "property" consists of the familiar bundle of "rights." "Property denotes the legal relations between persons with respect to a thing." *RESTATEMENT OF PROPERTY* § 1 (1936). A "right" is a "legally enforceable claim of one person against another, that the other shall do a given act or not do a given act." *Id.* The "other" is under a correlative "duty," which the *Restatement* defines as "a legally enforceable obligation to do or not do an act." *Id.*

60. A "power is an ability of a person to produce a given change in a given legal relation by doing or not doing a given act." *Id.* § 3. It is also the ability "to create, transfer and divest oneself of rights." *Id.* The correlative of power is "liability." *See also* R. BROWN, *supra* note 1, § 2; Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16, 30 (1913).

61. *See infra* note 71.

62. As the rightful holder of all or most of the "sticks" of ownership, the indefeasible titleholder may create effective derivative property claims to collateral.

63. U.C.C. § 2-401(1) requires "explicit" agreement about the passage of title as to "identified" goods. *See id.* Goods must, however, be in existence before they can be

article 2 gap-filler provisions will perform this function.⁶⁴ Thus, the type of title a buyer receives, and when he takes it, may depend entirely upon how the gap-filler provisions of article 2 supplement the contract of sale.

Section 2-401, one of the gap-filler provisions, provides rules to determine title when the agreement of the parties does not mention it. In the example above, because ABC Corporation and XYZ Corporation did not address title matters in their agreement, section 2-401 would provide that title to the lamps passed from ABC Corporation to XYZ Corporation when ABC Corporation delivered the goods to the carrier for shipment to XYZ Corporation.⁶⁵

But section 2-401 does not determine which kind of title the article 2 buyer takes, and consequently, what "rights" to the goods, if any, the buyer may sell. Other article 2 gap-filler provisions must be consulted on that issue. To determine whether a party has acquired a provisional or an indefeasible title, it is necessary to monitor the performance of the article 2 contract.⁶⁶

The article 2 seller of goods, for example, may have a right to stop delivery of goods while they are in transit.⁶⁷ If the seller does stop delivery, the buyer will be deprived of any provisional title to the goods that the Code might have given the buyer.⁶⁸ The buyer

identified. *See id.* § 2-501(1). The requirements were identical under prior law. *See* UNIFORM SALES ACT § 17 (1906).

64. *See* U.C.C. § 2-401(2) (passing of title).

65. *See id.* Section 2-401(2) provides for the passage of title to the buyer "at the time and place at which the seller completes his performance with reference to the physical delivery of the goods." *Id.* Because no delivery term was specified, the contract between ABC Corporation and XYZ Corporation was, under Code gap-filler provisions, a "shipment contract." *See id.* § 2-504. Under a shipment contract, the seller completes his physical delivery of the goods when he properly places them "in the possession of a carrier." *Id.*

66. "'Contract' means the total legal obligation which results from the parties' agreement as affected by this [Code]." *Id.* § 1-201(11). The parties' "agreement," which may or may not amount to an enforceable contract, is their bargain in fact. *See id.* § 1-201(3).

67. *See id.* § 2-705. As a Code remedy under U.C.C. § 2-703(b), the seller's ability to stop delivery is also a Code "right." *See id.* § 1-201(36). The right is broadest "where the seller discovers the buyer to be insolvent." *Id.* § 2-702(1). In that case, he may stop even small shipments of goods and demand cash. *See id.* A seller may stop delivery of larger shipments "when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim goods." *Id.* § 2-705(1). Large shipments include carloads, truckloads and paneloads. *See id.* In making this distinction, the Code drafters weighed the burden on the carrier in obeying a stop order and concluded that it is justified even for small shipments when the buyer is insolvent. *See id.* § 2-705 official comment 1.

68. "After an effective stoppage under this section the seller's rights in the goods are the same as if he had never made delivery." *Id.* § 2-705 official comment 1. Upon a

will also be deprived of all rights to create security interests in or leases of the goods, if the buyer has not paid for the goods.⁶⁹ If the seller does not stop delivery or subsequently reclaim the goods, then the buyer will obtain indefeasible title to the goods.⁷⁰

Once a buyer obtains possession of the goods, a seller may have a right to assert article 2 reclamation rights.⁷¹ Because these reclamation rights presuppose nonpayment,⁷² the buyer will not only be deprived of the provisional title that delivery gave, but also of any power to create the derivative Code interests.⁷³ Thus, if the seller does not reclaim the goods, the buyer's title to them will become

resale, the seller may keep any surplus. See *id.* § 2-706(6); Gilmore & Axelrod, *Chattel Security I*, 57 YALE L.J. 517, 524 (1948). Under the Uniform Sales Act, "the buyer's property interest in the goods [was] held subject to [the power to stop delivery] while the goods [were] in transit." L. VOLD, *LAW OF SALES* § 52, at 259 (2d ed. 1959).

69. "The essential basis of the right of stoppage *in transitu* is clearly the injustice of allowing the buyer to have property when he has not paid and, owing to his insolvency, cannot pay the price that was to be given in return for the goods. In other words, the fundamental basis of the right is the far reaching principle allowing rescission and restitution where there is actual or prospective failure of consideration." 3 S. WILLISTON, *THE LAW GOVERNING SALES OF GOODS* § 518, at 119-20 (rev. ed. 1948). If the buyer has paid for the goods, his secured party will be able to enforce whatever right the buyer had to restitution. See *State Bank of Young America v. Vidmar Iron*, 292 N.W.2d 244 (Minn. 1980). If the stoppage amounts to a breach, the buyer may have a right to replevy the goods, which right will be enforceable by the buyer's secured party. See U.C.C. § 2-716(2).

70. The seller can effectively stop delivery until the buyer takes possession or control of the goods. See U.C.C. § 2-705(2); e.g., *Ceres, Inc. v. ACLI Metal & Ore Co.*, 451 F. Supp. 921, 924-25 (N.D. Ill. 1978).

71. See U.C.C. §§ 2-507, 2-511 (cash sales); *id.* § 2-702 (credit sales). As Code "remedies," these sellers' "rights" reflect venerable common-law doctrine. Under the common-law "cash sale" doctrine, the nonpaying cash buyer received no title to the goods. Consequently, his secured creditors had no "derivative" claim to enforce. E.g., *Laughlin Motors v. Universal C.I.T. Corp.*, 173 Kan. 600, 604-05, 251 P.2d 857, 861 (1952). See generally L. VOLD, *supra* note 68, § 30 (describing bad check cash sales under common law). The credit seller was treated differently. The insolvent buyer took title to the goods and the seller was left with a lien on them that could be enforced until the buyer took possession. The distinction between cash and credit sales was based on the seller's intent. See Comment, *The Owner's Intent and the Negotiability of Chattels: A Critique of Section 2-403 of the Uniform Commercial Code*, 72 YALE L.J. 1205, 1211 (1963). In the cash sale, the seller conditioned the sale on payment. But because the price was deferred in the credit sale, the seller was held to have sold the goods and assumed the risk of nonpayment. See *id.* at 1219-26.

72. In the "cash sale," the buyer's check bounces. In the credit sale, the buyer is "insolvent," as defined in U.C.C. § 1-201(23), and constructively unable to pay.

73. In both cases, the buyer will take a provisional title to the goods. See *supra* text accompanying note 57. The buyer will, however, have the power, but not the right, to create indefeasible title in good faith purchasers for value under U.C.C. § 2-403(1) even though such a transfer of title was not "rightful." See U.C.C. § 2-312(1) (warranty of title breached where transfer not "rightful").

indefeasible unless the buyer takes steps to throw title to the goods back to the seller.

For example, after receipt of the goods, the buyer may exercise rights to reject⁷⁴ the goods or to revoke acceptance.⁷⁵ Upon the exercise of such rights, title to the goods is restored to the seller.⁷⁶ If the buyer pursues these remedies after paying for the goods, the buyer will retain rights to the goods that he, or someone claiming through him, can enforce even after the title to the goods is restored to the seller.⁷⁷ The title that the seller regains will therefore only be provisional because it can be defeated by the assertion of such rights.⁷⁸

These rescission-like remedies allow the seller to recover title to the goods or the buyer to return title to the seller.⁷⁹ In both cases, any provisional title that the buyer may have had to the goods will be terminated. Unless the buyer paid the seller for the goods, third parties who bargained with the buyer for security interests⁸⁰ or

74. See U.C.C. § 2-601 (buyer's rights on improper delivery).

75. See *id.* § 2-608 (revocation of acceptance in whole or in part).

76. See *id.* § 2-401(4). In the case of rejection, title will be restored to the seller even though the rejection is "wrongful" and amounts to a breach of contract. See *id.*

77. U.C.C. § 2-711(3) gives the buyer a "security interest" in the goods upon "rightful" rejection or "justifiable" revocation of acceptance to the extent that the buyer has paid for them. These article 2 security interests arise by operation of article 2 law and are governed by article 9. See *id.* § 9-113. Because a security interest is a property "right" which makes the debtor "liable" for payment, the buyer's secured party can enforce it against the seller to the extent that the buyer could. Article 2 security interests are foreclosed under article 2 by resale of the goods. See *id.* § 2-706. The secured buyer is a "person in the position of a seller." *Id.* § 2-707. Because title has reverted to the original seller, the buyer must account to him for any surplus. See *id.* § 2-706(5).

78. *But cf.* U.C.C. § 2-706(5), under which the good faith resale buyer "takes the goods free of any rights of the original buyer." *Id.*

79. Article 2 preserves the buyer's rights to rescind the contract for material misrepresentation or fraud. See *id.* § 2-721; E. FARNSWORTH, *CONTRACTS* § 4.15 (1982). The buyer who "wrongfully" rejects goods will usually have no "rights" in them. See U.C.C. § 2-703 (seller may cancel). In the unlikely case that he has paid some of the price, he will be able to set off that amount in a lawsuit by the seller for damages. See, e.g., *id.* § 2-708(1) (seller can recover the difference between the market and the "unpaid" contract prices).

80. Upon a resale of the goods, the seller could pocket the entire proceeds because U.C.C. § 2-706(5) does not force the seller to account to the buyer for the goods. The buyer's floorplanner will have no claim to the goods either because the buyer never "acquired" them. The buyer's article 9 purchase money secured creditor, however, would stand on a different footing. See *id.* § 9-107 (purchase money secured creditor gives value to enable debtor to "acquire rights" in the collateral). Once his security interest "attaches," see *id.* § 9-203, it will continue in the goods "notwithstanding [their] disposition." *Id.* § 9-306(1)-(2). If the wrongful rejection of the goods amounts to a default under the security agreement as well, the secured party will be able to replevy the goods from the seller and assert his security interest in an article 9 foreclosure pro-

leases⁸¹ in the goods will be ousted of their Code property claims.⁸²

Thus, under article 2, the acquisition of indefeasible title to goods by the buyer, and the enforceability of third party claims to the goods through the buyer, may depend upon whether the seller exercises remedies to recover the goods from the buyer, or whether the buyer exercises remedies that foist title to the goods back on the seller.⁸³

In the completed sale such remedies will be unavailable even if the contract was breached. For example, the buyer may accept⁸⁴ nonconforming goods⁸⁵ or be barred from revoking acceptance of such goods.⁸⁶ In these cases, despite the breach and the cause of action for damages created by this breach,⁸⁷ the sale will be completed,⁸⁸ and the buyer's title to the goods will be indefeasible.⁸⁹ The buyer will have whatever "rights" are necessary to exploit the goods by leasing them or by using them as collateral for a loan. Because of this indefeasible title, the breach notwithstanding, these derivative Code claims to the goods that the buyer creates cannot be overcome by the seller.

IV. VOIDABLE TITLE

One kind of article 2 provisional title gives buyers the power, but not the right, to do something that they cannot ordinarily do with article 2 provisional title. With "voidable title" buyers may create indefeasible title to the goods in good faith purchasers for value.⁹⁰

ceeding. Any surplus will go to the seller to compensate him for his ownership interest. *See id.* § 9-504(1)-(2).

81. *See id.* § 2A-307(2)(a).

82. *Cf. supra* note 73.

83. *See id.* § 2-601(a). Section 2-709(1)(b), a specific performance remedy for the aggrieved seller, permits a seller to hold a buyer responsible for the price of the goods when he is unable to resell them. In that event, he must hold the goods for the buyer. *See id.* § 2-709(2). Thus, an aggrieved seller may be able to foist the goods on the wrongfully rejecting buyer.

84. *See id.* § 2-606 (what constitutes acceptance of goods).

85. The buyer might accept with awareness of the nonconformity under U.C.C. § 2-606(a) and in ignorance of it under § 2-606(b). An "act inconsistent with the seller's ownership" can also amount to an acceptance under § 2-606(c).

86. *See id.* § 2-608 (revocation of acceptance in whole or in part).

87. *See id.* § 2-714 (buyer's damages for breach when goods are accepted).

88. While the buyer must then pay for them "at the contract rate" under § 2-607(1), the buyer may deduct his damages from the price under § 2-717.

89. *See* U.C.C. § 2-607(2) (acceptance of goods bars rejection and, if made with knowledge of the nonconformity, revocation of acceptance).

90. U.C.C. § 2-403(1) provides in part:

Voidable title arises when the buyer induces the seller, through fraudulent misconduct, to enter into an article 2 contract of sale.⁹¹ The seller may rescind the contract for the fraud and recover indefeasible title to the goods.⁹² Unlike other article 2 provisional titles, the presence of voidable title mandates that the courts look beyond the rights conferred by the contract of sale to the perceptions of third party purchasers.⁹³ This provisional title is therefore linked with, and is inseparable from, "ostensible title," which is really no title at all but rather a pervasive Code policy⁹⁴ that protects certain kinds of (but not all) good faith purchasers of goods from prior Code claims.⁹⁵

Ostensible title is grounded on the principle that possession

A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value.

Id. The New York Law Revision Commission read § 2-403 as replicating the "historic test" of the Uniform Sales Act, which stated: "Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods provided he buys them in good faith . . ." 1 STATE OF N.Y. LAW REVISION COMMISSION REPORT, STUDY OF THE UNIFORM COMMERCIAL CODE 455-56 (1955 & reprint 1980).

"Voidable title" is not defined in the U.C.C. and has been characterized a "murky concept." J. WHITE & R. SUMMERS, *supra* note 30, at §§ 3-11. According to Professor Gilmore, "the [§ 2-403] drafting [was] terribly botched." Gilmore, *The Good Faith Purchase Idea and the U.C.C.: Confessions of a Repentant Draftsman*, 15 U. GA. L. REV. 605, 619 (1981). The Uniform Sales Act also included voidable title provisions. *See* Uniform Sales Act §§ 23(1), 24 (1906). Their effect, however, was more limited. *See* L. VOLD, *supra* note 68, § 30, *see also* S. WILLISTON, *supra* note 69, § 625a, at 409; Comment, *supra* note 71, at 1206.

91. As illustrative examples, § 2-403(1) provides:

the purchaser has such power even though

- (a) The transferor was deceived as to the identity of the purchaser, or
- (b) The delivery was in exchange for a check which is later dishonored, or
- (c) It was agreed that the transaction was to be a "cash sale," or
- (d) The delivery was procured through fraud punishable as larcenous under the criminal law.

U.C.C. § 2-403(1).

92. *See id.* § 2-402(2).

93. *See id.* § 2-403(d) (good title can be transferred to a "good faith purchaser for value.").

94. *See id.* § 2-403(2) (article 2—buyer in the ordinary course of business); *id.* § 2A-304 (article 2A—subsequent lessee of goods); *id.* § 3-305 (article 3—holder in due course); *id.* § 4-209 (article 4—holder in due course); *id.* § 7-502 (article 7—holder through due negotiation); *id.* § 8-302 (article 8—subsequent bona fide purchaser); *id.* § 9-308 (article 9—buyer in the ordinary course of business), *id.* § 9-309 (subsequent bona fide purchaser and holder in due course).

95. *See, e.g.,* Jackson, *Embodiment of Rights in Goods and the Concept of Chattel Paper*, 50 U. CHI. L. REV. 1051 (1983).

and title to property are so intertwined that innocent third parties might be misled by a false appearance of ownership.⁹⁶ It shelters a broad class of third parties who part with value on the strength of the apparent or "ostensible" ownership of property that possession implies.⁹⁷ At common law, the innocent parties protected were reliance purchasers who either bought the property outright or took it as collateral for a loan.⁹⁸

In general, the Code embodies these marketplace principles throughout its text. Yet the amount of protection a transferee will receive, like all other Code consequences, will depend upon the kind of Code property interest involved in the transaction. The Code's ostensible title principles are less burdensome on article 2 and 2A title claims than they are on other Code property claims. For example, under articles 3⁹⁹ and 7,¹⁰⁰ thieves can cut off title to instruments and documents by transferring them to subsequent, unsuspecting purchasers for value. Yet, barring an estoppel or other preclusive conduct charged to their owner, under articles 2¹⁰¹ or

96. See, e.g., *Clow v. Woods*, 5 Serg. & Rawle 275, 288 (Pa. 1819) (unrecorded mortgage held void where seller remained in possession). *Clow's* principles left their tracks throughout the Code. Section 2-402(2), for example, allows creditors of a seller to treat as void under state fraudulent conveyancing statutes apart from the Code any sale by a seller after retention of possession unless done "in good faith." See *id.*; Dolan, *supra* note 50, at 1178.

97. Mere possession, however, is not enough. See L. VOLD, *supra* note 68, § 61. Under agency or estoppel principles, the owner must be responsible for creating the misperception. See *Porter v. Wertz*, 53 N.Y.2d 696, 700-01, 421 N.E.2d 500, 501-02, 439 N.Y.S.2d 105, 106-07 (1981); RESTATEMENT (SECOND) OF AGENCY 175 (1957). Thus, Code ostensible title embraces agency and estoppel principles. See U.C.C. § 2-403(1) & official comment 1 (1972); see also Lawrence, *The "Created by His Seller" Limitation of Section 9-307(1) of the Uniform Commercial Code*, 60 IND. L.J. 73, 89-93 (1984); Comment, *supra* note 71.

98. "[T]he good faith purchaser idea first showed up in the distribution of goods from the manufacturer to the user through a factor who would sell or pledge them in violation of his contract with the manufacturer." Gilmore, *supra* note 90, at 608. The theory was that because the manufacturer had voluntarily entrusted goods to the factor, who was in possession of them with a power of sale, the factor must have had "some kind of title" upon which third parties could rely. Subject to an estoppel, however, the factor had no power to pledge the principal's goods for his own debts. See 35 C.J.S. *Factors* § 14 (1960). The First English Factors Act, 4 Geo. 4, ch. 83 (1824), was enacted to protect both good faith buyers or pledgees from factors. Factors acts were also adopted in America and then largely repealed. The few that remained were preserved by § 23 of the Uniform Sales Act. See Gilmore, *supra* note 90, at 614; Warren, *Cutting Off Claims of Ownership under the Uniform Commercial Code*, 30 U. CHI. L. REV. 469, 471 (1963).

99. See U.C.C. § 3-305(1).

100. See *id.* § 7-502(1)(b).

101. Section 2-403 requires that the owner either create voidable title to the goods in the buyer or entrust them to a merchant who deals in goods of that kind. See generally R. HILLMAN, J. McDONNELL & S. NICKLES, *COMMON LAW AND EQUITY UNDER THE UNIFORM*

2A¹⁰² thieves cannot do the same with goods.

The article 2A lessor's ownership interest appears to be the most secure of all. The lessor need not publish notice of it, yet only one kind of third party purchaser, the revered "buyer in the ordinary course of business,"¹⁰³ can defeat it.¹⁰⁴ The article 9 secured party's claim receives the least protection from third party purchasers. If the secured party has not published notice of her security interest in the goods, she will lose out to a broad class of good faith purchasers for value.¹⁰⁵

The rights of reclaiming sellers under article 2 are, however, unsettled. An uncertain relationship has long existed between articles 2 and 9. Indeed, according to one of the Code's chief scriveners, "[t]he dividing line . . . between article 2 good faith purchasers and article 9 good faith purchasers is not an easy one to draw."¹⁰⁶ The introduction of article 2A, the new lease article that was derived from articles 2 and 9, will aggravate the jurisdictional conflict. The confusion, which stems from the Code drafters' strong injunctions against title, can be traced directly to *In re Samuels*,¹⁰⁷ a notorious case from the United States Court of Appeals for the Fifth Circuit.

V. *IN RE SAMUELS*: SECURITY INTERESTS THAT MASQUERADE AS OWNERSHIP

Samuels involved a priority clash between an unpaid article 2 seller of inventory and a floating lienor of the buyer.¹⁰⁸ The seller

COMMERCIAL CODE § 5.04 (1985). "Under 2-403, voidable title is to be distinguished from void title. A thief, for example, 'gets' only void title and without more cannot pass any title to a good faith purchaser." J. WHITE & R. SUMMERS, *supra* note 30, at 173. The owner must intend voluntarily to part with his chattel. The issue is "[w]hat kind of risks did the owner take . . . with his chattel?" Comment, *supra* note 71, at 1216.

102. Cf. U.C.C. § 2A-305 (describing the preclusive conduct required); *Rohweder v. Aberdeen Prod. Credit Ass'n*, 765 F.2d 109, 113 (8th Cir. 1985) (there must exist actual reliance on language or conduct for estoppel).

103. See U.C.C. § 1-201(9).

104. See *id.* § 2A-305(2).

105. See *id.* § 9-301.

106. Gilmore, *supra* note 90, at 619.

107. *In re Samuels & Co.*, 526 F.2d 1238 (5th Cir. 1976) (en banc), *cert. denied*, 429 U.S. 834 (1976).

108. The case consumed prodigious legal resources. The referee in bankruptcy held for the sellers. The district court reversed, holding for the secured party. The court of appeals reversed and held for the unpaid sellers. *In re Samuels & Co.*, 483 F.2d 557, 563 (5th Cir. 1973). The Supreme Court reversed, holding that the Packers and Stockyards Act of 1921, 7 U.S.C. § 181-229 (1988), upon which the court of appeals had relied, did not apply. *Mahon v. Stowers*, 416 U.S. 100, 113-14 (1974) (per curiam). On remand, the court of appeals applied the Code and held for the sellers with Judge Godbold dissenting. *In re Samuels*, 510 F.2d 139 (5th Cir. 1975). The panel's decision was then

sought to rescind the sale and recover the equivalent of unencumbered ownership of the goods. Because of the magnitude of the buyer's indebtedness to its secured creditor, the creditor's claim was coextensive with the goods' value. The Fifth Circuit therefore had to determine which party had the better right to the goods.

In *Samuels*, the sellers were ranchers who sold cattle to a meatpacker on a "grade and yield" basis.¹⁰⁹ The understanding was that the cattle would first be slaughtered and, after the carcasses were graded, the sellers would then promptly be paid their due.¹¹⁰ Secured by a floating lien, C.I.T. Corporation, a finance company, had on file a notice of a claim to all current and future inventory of the meatpacker.¹¹¹ Sellers delivered cattle to the meatpacker, which issued its check to them in payment. Because C.I.T. had refused to advance funds to cover the check, it bounced.¹¹² Immediately thereafter, the meatpacker filed for bankruptcy.¹¹³ Asserting article 2 reclamation theories, sellers sought to enforce their ownership rights by recovering the value of the delivered cattle.¹¹⁴ C.I.T. contended, however, that its security interest should prevail under article 9.¹¹⁵

Article 2 contains two reclamation provisions that allow a seller to recover the goods, as opposed to damages, from a defaulting buyer. One, which was received from the common law, applies to cash sales;¹¹⁶ the other applies to credit sales.¹¹⁷

reversed per curiam by the court sitting en banc. *In re Samuels*, 526 F.2d 1238 (5th Cir. 1976). The judgment of the district court was affirmed, and Judge Godbold's dissent was adopted by the majority with five judges dissenting. *Id.* The Supreme Court denied certiorari, *Stowers v. Mahon*, 429 U.S. 834 (1976), and Congress ultimately amended the Packers and Stockyards Act of 1921 to establish the priority that the sellers sought. See Act of Sept. 13, 1976, Pub. L. No. 94-410, § 8, 90 Stat. 1249, 1251 (codified as amended at 7 U.S.C. § 196 (1988)).

109. See 510 F.2d at 146.

110. *Id.*

111. *Id.* at 144.

112. *Id.*

113. *Id.*

114. See *id.* at 146.

115. *Id.* at 148.

116. U.C.C. § 2-507(2) provides: "Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due." *Id.*

Section 2-511(1) provides: "Unless otherwise agreed tender of payment is a condition to the seller's duty to complete any delivery." *Id.* § 2-511(1).

Unlike the credit seller's right under § 2-702, see *infra* note 117, the cash seller's reclamation right is implicit. See U.C.C. § 3-507 official comment 3. The common-law origins of these provisions are discussed *supra* at note 71.

117. U.C.C. § 2-702(2) provides in pertinent part: "Where the seller discovers that

Under the "cash sale" provisions, a seller may reclaim goods where a payment, due and demanded on the delivery of the goods to the buyer, is not made.¹¹⁸ Code cash sale doctrine further provides that the buyer's "right as against the seller to retain or dispose of [the goods] is conditional upon his making the payment due."¹¹⁹ The other reclamation provision, which applies to sales made on open credit, has no common-law counterpart.¹²⁰ Nor does it expressly condition the buyer's rights to the goods in the way that the cash sale provisions do.¹²¹ A predicate for both remedies is that the seller must notify the buyer, within ten days after the buyer has received the goods, of his intention to reclaim.¹²² Even when this condition has been satisfied, however, both reclamation rights may be cut off by certain good faith purchasers for value.¹²³

Because of the deferred payment arrangement that existed between the ranchers and the meatpacker, a threshold issue was which of the article 2 reclamation provisions applied. The court con-

the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt" *Id.*

118. See *supra* notes 71, 116 and accompanying text.

119. U.C.C. § 2-507(2).

120. See *supra* note 71 and accompanying text.

121. Compare *supra* note 117 with text *supra* accompanying note 119.

122. See *supra* note 117. Official comment 3 to § 2-507 provides in relevant part: "The provision of this Article for a ten day limit within which the seller may reclaim goods delivered on credit to an insolvent buyer is also applicable here." Not all courts agree, however, that the ten-day limit on reclamation applies to the cash seller. *E.g.*, *Citizens Bank of Roseville v. Taggart*, 143 Cal. App. 3d 318, 323, 143 Cal. Rptr. 729, 732 (1983) (ten-day rule works "unnecessary hardship" on cash seller who will not discover the check is bad within the 10 days).

The ranchers failed to make their reclamation demand within ten days of Samuels' receipt of the goods. The court excused the ranchers' noncompliance on the ground that their failure had not prejudiced C.I.T. The purpose of the requirement, the court suggested, was to prevent a creditor from relying on a debtor's ostensible ownership. Because C.I.T. "had such an in-depth knowledge of Samuels' financial affairs, it was well aware of the claims of [the ranchers] that were unpaid as a result of its refusal to advance more money," the court argued. See *In Re Samuels*, 510 F.2d 139, 147 (5th Cir. 1975). The dissenter seemed perplexed by the notification requirement. "I have somewhat greater difficulty than my brothers in pinpointing the purpose of the ten-day rule." *Id.* at 157 (Godbold, J., dissenting). Professor Williston suggests that the notification serves solely to rescind the sale and trigger the seller's right to specific restitution. S. WILLISTON, *supra* note 69, § 554. The notification is of no benefit whatsoever to third parties. See *Baird & Jackson*, *supra* note 53, at 209 ("the most troubling weakness of the Code's reclamation right"). Finally, the ten-day rule may not even apply if the buyer makes a written misrepresentation of solvency. See U.C.C. § 2-702(2).

123. U.C.C. § 2-702(3) provides: "The seller's right to reclaim . . . is subject to the rights of a buyer in [the] ordinary course [of business] or other good faith purchaser under this Article (2-403)." *Id.* See *supra* note 122.

cluded that cash sales were intended¹²⁴ and held that, as a reclaiming seller, the ranchers' rights to the proceeds generated by the carcasses were superior to C.I.T.'s.¹²⁵

On the priority issue, the majority appeared to be on solid ground. It reasoned that, because its check had bounced, the meatpacker had not tendered under the article 2 contract.¹²⁶ Consequently, it had no "rights" in the carcasses to which C.I.T. could attach its article 9 floating lien.¹²⁷ As to the fairness of its holding, the majority said: "We do not believe that the drafters of the Code intended for the unpaid sellers to walk away from the transaction with nothing, neither their goods nor the purchase price, while the mortgagee enjoys a preferred lien on that for which it refused to advance payment."¹²⁸

In the dissent's view, however, the ranchers no longer had any goods to recover under article 2 reclamation principles.¹²⁹ Because the sellers had sold the carcasses, the dissent reasoned, they had transferred the title, albeit voidable, to the meatpacker.¹³⁰ That made the ranchers financing sellers, which gave them a "security interest"¹³¹—specifically a purchase money security interest, arising

124. See 510 F.2d at 146. The question was whether the buyer's payment to the sellers was "substantially simultaneous." See *id.* Relying on the "established course of dealing" between them, see U.C.C. § 1-205(1), the court said, "the delay between delivery and payment was not credit, but rather was the result of a procedure mandated by the Act and regulations that governed the relationship between the buyer and seller when cattle are sold on a grade and yield basis." *Id.* at 146. For similar reasons, courts treat payment by check as a "cash sale" despite the credit that floats between tender of the check and its collection. See Vold, *Worthless Check Cash Sales, "Substantially Simultaneous" and Conflicting Analogies*, 1 HASTINGS L.J. 111, 111-14 (1950).

125. See 510 F.2d at 151.

126. See *id.* at 144-49. Tender under the article 2 contract requires that the seller must deliver the goods and the buyer must accept and pay for them. See U.C.C. § 2-301. As concurrent, dependent conditions, each party's tender is a condition precedent for the other's. To put a party in breach of the article 2 contract, the plaintiff must therefore show that, at the time of the defendant's default, he was ready, willing, and able to perform. See *id.* §§ 2-301, 2-507, 2-511. See generally R. NORDSTROM, *supra* note 43, § 94. These sales rules originated with Lord Mansfield's opinion in *Kingston v. Preston* (K.B. 1773) (reported in *Jones v. Barkley*, 2 Doug. 684, 99 Eng. Rep. 434, 437-38 (K.B. 1781)) and were refined in *Morton v. Lamb*, 101 Eng. Rep. 890 (K.B. 1797). See C. KNAPP & N. CRYSTAL, *PROBLEMS IN CONTRACT LAW* 716-17 (1987).

127. See 510 F.2d at 145.

128. *Id.* at 153. See R. HENSON, *supra* note 21, § 17-2, at 257 (floating lien reaches the buyer's equity which would be "nothing" without payment).

129. See 510 F.2d at 158 (Godbold, J., dissenting).

130. See *id.*

131. See *id.* The dissent argued that, by invoking article 2 reclamation rights, the ranchers were pressing, in effect, a "title" claim to sold goods. To the dissent, that was tantamount to an attempt to "reserve" title in an article 2 sale. See *id.* Under U.C.C. § 2-401(1), "[a]ny retention or reservation by the seller of the title (property) in goods . . . to

under article 2.¹³²

The dissent contended that article 2 reclamation rights are nothing more than article 2 security interests which, like virtually all Code security interests, are governed by article 9.¹³³ Thus, in the dissent's view, the contest was really between contending secured parties; and therefore, article 9 neatly controlled the priorities.¹³⁴ Because the ranchers did not comply with the stringent article 9 notice requirements and C.I.T. had complied, C.I.T. should prevail.¹³⁵

But to reach this conclusion, the dissent was forced to confront the majority's argument that the meatpacker had not acquired sufficient "rights" in the carcasses to which C.I.T.'s floating lien could attach.¹³⁶ In so doing, the dissent trespassed onto unhallowed ground. The result was the enduring confusion between Code title and security interests.

Because the meatpacker had acquired the title to the carcasses, the dissent reasoned that C.I.T., a Code "purchaser"¹³⁷ for "value,"¹³⁸ picked up "title" to the property under its security agreement.¹³⁹ Unfazed by C.I.T.'s decision to withhold the money that its foundering debtor would have used to pay for the carcasses, the dissent contended that C.I.T. was the kind of "good faith pur-

the buyer is limited in effect to a reservation of a security interest." Consequently, the dissent reasoned that the ranchers were asserting an article 2 security interest. *See* 510 F.2d at 158-59 (Godbold, J., dissenting).

132. *See* 510 F.2d at 158 (Godbold, J., dissenting); *see also* U.C.C. § 9-107 (defining "purchase money security interest").

133. *See* 510 F.2d at 158-59 (Godbold, J., dissenting). Article 2 reclamation rights are subject to both articles 2 and 9. *See* U.C.C. § 9-113. Security interests that arise in the check collection process are governed by U.C.C. § 4-208(3).

134. *See* 510 F.2d at 158-60 (Godbold, J., dissenting).

135. *See id.* at 160; U.C.C. § 9-312(5)(a) (first to file or perfect has priority). Because these were competing inventory security interests, the ranchers could have prevailed against C.I.T. by complying with its procedures, one of which was a written notification to C.I.T. by them of their secured claim. *See id.* § 9-312(3).

136. *See* 510 F.2d at 159 (Godbold, J., dissenting).

137. The article 1 definition of "purchase," to which the § 2-403 comments refer, broadly "includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property." U.C.C. § 1-201(32). Article 2A also contains a definition of purchase that is much more narrow. *See id.* § 2A-103(1)(v); *see also* Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L.Q. 159, 160 (1938) (purchase for value is "overbroad for intelligent use").

138. A person gives "value" for "rights" if he "acquires them as security for . . . a pre-existing claim." U.C.C. § 1-201(44)(b).

139. Under § 2-403, the dissent reasoned, "[t]he buyer is granted the *power* to transfer good title despite the fact that . . . he lacks the *right* to do so." 510 F.2d at 154 (Godbold, J., dissenting) (emphasis in original). "It is odd to say that title passes without rights passing as well." Baird & Jackson, *supra* note 53, at 209.

chaser" whose title was sheltered by section 2-403.¹⁴⁰

Thus, the dissent concluded, C.I.T. had acquired better title to the carcasses than its debtor had, a "good title" that carried with it more than enough rights to enforce the indebtedness.¹⁴¹ In defense of this outcome, the dissent argued that the ranchers could have protected themselves from C.I.T. "if they had merely complied with the U.C.C.'s purchase-money provisions. The Code favors purchase-money financing, and encourages it by granting to a seller of goods the power to defeat prior liens."¹⁴²

Upon a rehearing en banc, a deeply divided Fifth Circuit adopted the dissent's position along with its article 9 prescription for article 2 cash and credit sellers.¹⁴³ A concurring judge acknowledged the "seeming harshness" of a holding that "force[d] a cash seller to act like a credit seller in order to protect his interest," but concluded that this "insurance" was worth the price.¹⁴⁴

This admonition is echoed by the courts¹⁴⁵ and commentators¹⁴⁶ who have, with varying degrees of damnation and praise, endorsed the *Samuels* result. Nevertheless, the *Samuels* rule, which

140. See 510 F.2d at 155-56 (Godbold, J., dissenting). The majority pointed out that "the amount of C.I.T.'s cash advances were calculated only after C.I.T. examined weekly the outstanding accounts and current inventory of the business." *Id.* at 152. The weekly advance was determined on that basis. See *id.* Thus, the majority reasoned: "Since C.I.T. was so intimately involved in *Samuels*' financial affairs, it must have known that when it refused to advance additional funds, unpaid checks issued to cattle sellers by *Samuels* would be dishonored." *Id.* The dissent conceded that "lack of knowledge of outstanding claims is necessary to the common law [bona fide purchaser]" but the Code's honesty-in-fact rule, and the reasonable commercial behavior and fair dealing standards were met. *Id.* at 156. C.I.T. withheld funds, to the tune of \$1 million in advances "because of *Samuels*' taking voluntary bankruptcy at a time when its indebtedness to C.I.T. was enormous. The decision to terminate further funding was clearly reasonable." *Id.* The commentators generally agree with the dissent. See, e.g., J. WHITE & R. SUMMERS, *supra* note 30, § 23-10, at 1121. But see *American Food Purveyors, Inc.*, 17 U.C.C. Rep. Serv. (Callaghan) 436, 442 (N.D. Ga. 1976) (bad faith where secured party was "totally indifferent" to financial condition of its debtor).

141. See 510 F.2d at 154-56 (Godbold, J., dissenting).

142. *Id.* at 159-60.

143. See *In re Samuels & Co., Inc.*, 526 F.2d 1238, 1241 (5th Cir. 1976).

144. *Id.* at 1248 (Gee, J., specially concurring).

145. See, e.g., *King Foods v. Erie Farms*, 34 U.C.C. Rep. Serv. (Callaghan) 109 (Pa. D. & C. 1981). The *Samuels* result is so universally accepted that its rule is sometimes invoked without citation. See, e.g., *In re Bosler Supply Group*, 67 Bankr. 71, 73 (N.D. Ill. 1986), *rev'd on other grounds*, 74 Bankr. 250 (N.D. Ill. 1987).

146. See, e.g., R. HENSON, *supra* note 21, § 5-5, at 144-45; others include R. HILLMAN, J. McDONNELL & S. NICKLES, *supra* note 101, ¶ 18.02[4]; Dolan, *The UCC's Consignment Rule Needs an Exception for Consumers*, 44 OHIO ST. L.J. 21 (1983); Wiseman, *Cash Sellers, Secured Financiers and the Meat Industry: An Analysis of Articles Two & Nine of the Uniform Commercial Code*, 19 B.C.L. REV. 101 (1977).

reduces unpaid article 2 sellers to the position of secured parties and compels them to behave like secured parties, troubles many of the Code commentators.¹⁴⁷

VI. CODE DIVISIONS OF OWNERSHIP

The opposing views would agree, at a minimum, on one principle that should apply to this inter-article dispute. In construing the Code, the proper place to begin is with the applicable Code provisions: the article 2 reclamation provisions;¹⁴⁸ section 2-403, which limits the rights of the reclaiming seller;¹⁴⁹ and the article 9 provisions that determine the extent of the article 9 secured party's derivative claim to goods.¹⁵⁰

The relevant language of section 2-702, the model for cash reclamation, provides that the seller's "right to reclaim . . . is subject to the rights of a buyer in ordinary course or other good faith purchaser under *this Article (section 2-403)*."¹⁵¹ The relevant language of section 2-403 provides that a purchaser "with voidable title has power to transfer a *good title* to a good faith purchaser for value."¹⁵² While C.I.T. may have been a Code "purchaser," and a good faith one to boot, under Code title principles, it did not take "title" to the carcasses.

The Fifth Circuit was correct in calling C.I.T. a "purchaser."¹⁵³ Secured parties, like buyers, lessees, and even donees for that mat-

147. See, e.g., J. WHITE & R. SUMMERS, *supra* note 30, § 23-10, at 1122 ("it is not obvious to us whether the seller or secured creditor has the higher equity"); see also McDonnell, *The Floating Lienor as Good Faith Purchaser*, 50 S. CAL. L. REV. 429 (1977) (floating lienor should rely on sold goods); Comment, *The Rights of Reclaiming Sellers when Contested by Secured Creditors of the Seller*, 77 COLUM. L. REV. 934 (1977) (U.C.C. should be interpreted to give priority to cash sellers; this result is not at odds with the relevant code provisions and it is consistent with the common-law origins of reclamation).

148. See U.C.C. § 2-702(2), (3).

149. See *id.* § 2-403.

150. See *id.* §§ 9-201, 9-203(1)(c).

151. U.C.C. § 2-702 (emphasis added). Subsections (2) and (3) of § 2-403 deal with entrustment of goods to a "merchant who deals in goods of that kind." The merchant will have the power to transfer whatever "rights" the entrustor had in the goods to a "buyer in the ordinary course of business." While the ranchers may have entrusted their cattle to Samuels, a merchant of cattle, see U.C.C. § 2-104(1) (defining "merchant"), C.I.T. was not a "buyer in the ordinary course of business." As a Code-secured creditor, C.I.T. did not "buy" the carcasses from Samuels. See U.C.C. 1-201(a). "'Buying' . . . does not include a transfer as security for . . . a money debt." *Id.* § 1-201(9).

152. *Id.* § 2-403(1) (emphasis added).

153. *In re Samuels & Co.*, 526 F.2d 1238, 1242 (5th Cir. 1976) (adopting on rehearing the dissenting opinion of Judge Godbold in *In re Samuels & Co., Inc.*, 510 F.2d 139, 154 (5th Cir. 1975)).

ter, meet the general Code definition of "purchaser."¹⁵⁴ C.I.T. also gave "value,"¹⁵⁵ which under the broad Code definition allows past consideration to meet its test.¹⁵⁶ Finally, although every other ostensible title provision in the Code is written to shield only unsuspecting reliance purchasers,¹⁵⁷ section 2-403(1) is an exception. By its express language, the protected class is any "good faith purchaser for value."¹⁵⁸

But the Fifth Circuit overlooked one key provision and misread another. While the article 2 reclamation provisions do indeed subordinate the ownership claims of reclaiming sellers to bona fide "purchasers" under section 2-403,¹⁵⁹ these provisions are designed to give priority to reclaiming sellers, like the ranchers, over Code "creditors" such as C.I.T.

The court overlooked a revealing official comment to section 2-702(3). The section provides that "[s]uccessful reclamation of goods excludes all other remedies with respect to them."¹⁶⁰ In their official comment, the drafters explain that the seller's right to reclaim, unlike other Code remedies, is exclusive "because [it] constitutes preferential treatment as against the buyer's other *creditors*"¹⁶¹ The general Code definition of "creditor" includes "secured creditors" like C.I.T.¹⁶²

Although the comments may shed some light on the Code, they do not drive it. More significant is the kind of bona fide purchaser that article 2 explicitly protects. The court misread section 2-403(1), which deals with a purchaser who seeks to acquire "title" to goods from someone who appears to have it. C.I.T. never sought to acquire ownership of goods. Rather, it was an article 9 "secured party" hoping to acquire an enforceable "security interest" in the goods.¹⁶³

154. See U.C.C. § 1-201(32).

155. See *id.* § 1-201(44).

156. See *id.* § 1-201(44)(b).

157. See *supra* note 94 and accompanying text.

158. U.C.C. § 2-403(1).

159. See *id.* § 2-702(3).

160. *Id.*

161. See *id.* § 2-702 official comment 3.

162. See *id.* § 1-201(12). In his comment to an early Code draft, Karl Llewellyn saw a large role for reclamation. He wrote that it would provide a basis by which cash sellers may be able to assert rights in goods "[a]s against the buyer, his creditors, and any general representative of the buyer's creditors." THE UNIFORM REVISED SALES ACT § 58 comment, at 197 (Proposed Final Draft No. 1, 1944).

163. Section 2-403(1) deals with transfers of "title" to, and "limited interests" in, goods. "Limited interests," which the section defines in terms of "rights," include se-

"Title" and "security interest" have different Code meanings.¹⁶⁴ Under the Code, secured parties do not take "title" to goods, only article 2 "buyers" do.¹⁶⁵ Secured parties attach their claims to whatever rights the debtor has in the property. Because it did not tender, the meatpacker had no article 2 rights against the ranchers.¹⁶⁶ In short, C.I.T. did not expect to acquire the "good title" to the carcasses that the Fifth Circuit gave it.

No court that has dealt with the kind of dispute raised in *Samuels* has focused on the distinction between Code "title" and "security interests." As the text of the Code demonstrates, however, the drafters meant to distinguish between these claims to goods. For example, in the article 2 sale, sellers of goods give two warranties: they warrant their "good title"¹⁶⁷ to the goods and that the goods are free of any security interests.¹⁶⁸ Also, a rejecting or revoking buyer may retain a "security interest"¹⁶⁹ in the goods while simulta-

curity interests. See U.C.C. § 2-403 official comment 1. Section 2-403(1) states: "A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased." Unlike title to goods, "limited interests" in them are not negotiable under section 2-403(1). Thus, while one without rights to goods may have a "power" to convey "title" to them to a buyer in an article 2 sale, one will have no such power to transfer "rights" to them to a secured party in an article 9 secured transaction. See also *id.* § 9-318 (assignee's rights to account no greater than assignor's).

Article 3 grants to the transferor of a "limited interest" the power that the article 2 transferor lacks. Section 3-302(4) regulates the purchase of "limited interests" in instruments. Under it, the holder of an instrument that is subject to an ownership claim can subordinate it to his secured creditor's claim if the latter meets the bona fide purchaser for value requirements of article 3 by taking as a holder in due course. According to the drafters, "[t]his is merely a special application of the general rule . . . that a purchaser of a limited interest acquires rights only to the extent of the interest purchased." *Id.* § 3-302(4) official comment 4.

164. Article 9 covers "security interests" in personal property. Two kinds of outright sales of intangibles are, however, governed by article 9. Compare *id.* § 9-102(1)(a) (creation of security interests) with *id.* § 9-102(1)(b) (sale of accounts, contract rights, and chattel paper). "Commercial financing on the basis of accounts and chattel paper is often so conducted that the distinction between a security transfer and a sale is blurred, and a sale of such property is therefore covered . . ." *Id.* § 9-102 official comment 2.

165. "Title" is "sold" by a "seller" to a "buyer." See *id.* § 2-106(1). A "seller" is the person who "sells or contracts to sell goods." *Id.* § 2-103(1)(d). A "buyer" is the person who "buys or contracts to buy goods." *Id.* § 2-103(1)(a).

166. See *id.* § 2-507(2) (no "right" against seller) ("Where payment is due and demanded on the delivery to the buyer . . . , his right as against the seller . . . is conditional upon his making the payment due.").

167. See *id.* § 2-312(1)(a). The official comments refer to a "good, clean title." *Id.* § 2-312(1)(a) official comment 1. See also R. NORDSTROM, *supra* note 43, § 58, at 186 ("The title to which [the buyer] is entitled ought to be one that is free from colorable claims which existed at the time he purchased . . .").

168. See U.C.C. § 2-312(1)(b).

169. See *id.* § 2-711(3).

neously passing "title"¹⁷⁰ to the goods back to the seller. Finally, a party who has either "title" to goods or a "security interest" in them will have a cause of action against a third party who injures the goods.¹⁷¹

Even section 2-403 distinguishes between article 2 and article 9 purchasers. Section 2-403 directs secured party purchasers like C.I.T. to article 9 for a determination of their rights.¹⁷² Because section 2-403 is the only limitation on the reclamation rights of both cash and credit sellers, these sellers should therefore prevail against a floating lien creditor in a *Samuels* contest.¹⁷³

Nor is there a statutory basis for transforming reclaiming sellers into secured parties and applying article 9 priority rules. Like the distinction the Code makes between title and security interests, article 2 distinguishes between its reclaiming sellers and secured parties. Thus, a buyer who rightfully rejects goods or revokes his acceptance of them will retain an article 2 "security interest" in the goods to the extent that the buyer has made payments toward the purchase price.¹⁷⁴ Sellers who ship goods under a negotiable bill of lading also will have an article 2 "security interest" in the goods for their price.¹⁷⁵ When the article 2 drafters meant to create article 2 security interests, they stated so explicitly.¹⁷⁶ Reclamation rights are not so designated, suggesting that they were meant to be governed by other principles.¹⁷⁷

170. See *id.* § 2-401(4).

171. See *id.* § 2-722(a).

172. "The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Transfers (Article 6) and Documents of Title (Article 7)." *Id.* § 2-403(4).

173. A similarly vexing issue existed under a prior version of § 2-702 when the statute read that the reclaiming seller also took subject to the "rights of . . . a lien creditor under this Article (Section 2-403)." *Id.* § 2-702(3) (1962). Courts searched article 2 in general and § 2-403 in particular for such rights in vain until the statute was amended in 1966. See Braucher, *The U.C.C.—A Third Look?*, 14 CASE W. RES. 7 (1962).

174. See U.C.C. § 2-711(3).

175. See *id.* § 2-505(1)(a).

176. The authorities are sharply divided over whether article 2 reclamation rights are article 2 security interests. See Marshack, *The Return of the Reclaiming Seller: New Decisions Under the Bankruptcy Code and the Uniform Commercial Code*, 16 U.C.C. L.J. 187, 205-35 (1984). Unwilling to choose sides, White and Summers call them "quasi security claim[s]." J. WHITE & R. SUMMERS, *supra* note 30, at § 7-17.

177. To support their view that article 2 reclamation rights are article 2 security interests, Jackson and Peters rely on the general article 1 definition of security interest and the "drafting pattern of Article 2 that emphasizes the consequences rather than the labeling of commercial relationships." Jackson & Peters, *supra* note 53, at 926. According to them, a seller's right to stop delivery under § 2-705 should also be classified as an article 2 security interest because of the "plausible" references to that section in the

As esteemed common-law lawyers, the Fifth Circuit judges might be excused for failing to distinguish a title claim from a security interest. Under the common law and the Uniform Sales Act, secured parties took title to goods.¹⁷⁸ In *Samuels*, however, the Fifth Circuit applied title concepts that the drafters of the original Code discarded. In creating security interests, the Code's drafters never intended to give secured parties "title" to goods.

The legislative history of the Code also repudiates the *Samuels*' result.¹⁷⁹ To understand how title to goods and security interests in them were intended to relate under the Code, and why the courts have confused them, the Code's drafting history will next be reviewed.

VII. 1945-1989: FORGING THE DISCRETE CODE CLAIMS TO GOODS

The original blueprint for the Code, which excluded leases of

official comment to § 9-113. See *id.* at 921 n.59. An examination of the comment, however, suggests otherwise. It distinguishes between "security interests" and "rights of . . . stoppage under Section . . . 2-706 . . . which are *similar* to the rights of a secured party." U.C.C. § 9-113 official comment 1 (emphasis added). The comment further provides that "[t]he use of the term 'security interest' in the Sales Article is meant to bring the interests *so designated* within this Article." *Id.* (emphasis added). Their analysis creates conceptual difficulties with the seller who stops delivery and reacquires ownership of the goods. "If the seller's justifiable withholding of delivery furnishes the paradigm for Article 9 supervision, as an Article 9 security interest, . . . the seller's reacquisition can hardly escape similar characterization." Jackson & Peters, *supra* note 53, at 933. In other words, this seller is, simultaneously, both an owner and a secured party.

178. See *infra* notes 181-184 and accompanying text.

179. See *infra* Part VII. According to official comment 3 to § 9-312:

The reason for the additional requirement of notification [under Section 9-312(3)] is that typically the arrangement between an inventory secured party and his debtor will require the secured party to make periodic advances against incoming inventory or periodic releases of old inventory as new inventory is received. A fraudulent debtor may apply to the secured party for advances even though he has already given a security interest in the inventory to another secured party. The notification requirement protects the inventory financier in such a situation: if he has received notification, he will presumably not make an advance; if he has not received notification (or if the other interest does not qualify as a purchase money security interest), any advance he may make will have priority. Since an arrangement for periodic advances against incoming property is unusual outside the inventory field, no notification requirement is included in subsection (4).

U.C.C. § 9-312 official comment 3. The Code's spirit also repudiates the *Samuels* result. While Professor Rapson concurs with Professor B. Clark, that § 2-403 "[fits] like a glove" to *Samuels*, he suggests that voidable title was not designed to protect the secured party who extended old value and did not rely. See Rapson, *A 'Home Run' Application of Established Principles of Statutory Construction: U.C.C. Analogies*, 5 CARDOZO L. REV. 441, 446 (1983) (citing B. CLARK, *supra* note 26, at 8-43 (1980)). The Code drafters would agree with Professor Rapson.

goods, contemplated that sales and secured transactions would be regulated by two separate articles.¹⁸⁰ From the very beginning, however, a Gordian knot confronted the drafting teams that were designated by the Code's sponsors to draw the jurisdictional line separating these two articles.

The problem was the pervasiveness of title in property law. At common law, as well as under the first sales and chattel security statutes, both buyers of goods and lenders who took goods as collateral for loans could hold "title" to the goods.¹⁸¹ In 1945, when the two drafting teams set to work, a transfer of the title to goods was still a central step both in completing a sale and creating most security interests in goods. In short, both lenders and buyers bought goods.¹⁸²

These pre-Code security titles were provisional ones, akin to those that exist today under article 2. The performance or nonperformance of the primary condition of the security contract, namely discharge of the debt, determined the location and quality of title as it currently does under the article 2 sales contract. Until the condition was fulfilled, the financing party maintained provisional title to the goods.¹⁸³ If the condition was not fulfilled, the financing party's provisional title became an indefeasible one with its accompanying rights to exploit the goods.¹⁸⁴

180. For a concise history of the Code, see R. BRAUCHER & R. RIEGERT, *INTRODUCTION TO COMMERCIAL TRANSACTIONS* 19-31 (1977).

181. See L. JONES, *THE LAW OF CHATTEL MORTGAGES AND CONDITIONAL SALES* § 1 (R. Bowers ed. 1933) (title conveyed to chattel mortgagee); L. VOLD, *supra* note 68, at § 57 (title retained by conditional seller). An exception was the "pledge" in which possession of goods was transferred to the pledgee while the pledgor retained his title to them. See L. JONES, *supra*, at § 4.

182. See *UNIFORM SALES ACT* § 1 (1906) (sale defined as transfer of "property" in the goods); L. JONES, *supra* note 181, at § 1 (formal mortgage of property as "conditional sale of it"). By then the "minority" rule that foreshadowed the article 9 property interest was in force for chattel mortgages. Some jurisdictions treated them as "creating a mere lien on the property" rather than ownership. See *id.*

183. See *supra* note 182. "Under the earlier common law rule, the chattel mortgage operates as a sale vesting legal title in the mortgagee subject to defeasance by performance of the conditions of the mortgage." L. JONES, *supra* note 181, at 3. In describing the conditional sale, Professor Gilmore said, "if a seller had agreed to make an absolute sale to his buyer, then, once he had lost possession, he could be only a creditor for the price; nevertheless, if he had made the sale only on a *condition* that the buyer perform some act (such as payment of the price), then it must follow that, on condition broken, the contract was at an end, the status quo ante should be restored and the seller, if he had lost possession of the goods, should get them back." G. GILMORE, *supra* note 30, at 66 (emphasis in original). "At common law . . . [the] conveyance passed the whole legal title to the mortgagee, subject to be defeated on condition subsequent," 59 C.J.S. *Mortgages* § 1(b)(2) (1949).

184. The seller could also waive a breach.

In form, too, these pre-Code chattel security devices mimicked outright sales of goods. The mortgagee typically obtained his title from the mortgagor as a buyer would: by extracting a bill of sale from the mortgagor.¹⁸⁵ In the conditional sale, the contract of sale simply deferred the passage of title until payment of the contract price.¹⁸⁶ Consequently, the written instruments that established pre-Code secured transactions were often identical to those that created outright sales.¹⁸⁷

To complicate matters further for the Code's drafters, timing and organizational factors aggravated the jurisdictional issue that divided article 2 and article 9.¹⁸⁸ The article 9 project proceeded at a much slower pace than the article 2 project,¹⁸⁹ and there was a lack

[A]s an alternative to retaking the goods [the seller]. . . could act as if the breach of condition had not occurred, as if the sale had been absolute in the first place, and hold the buyer for the unpaid price; if the seller elected to continue with the contract, waiving the condition, he obviously lost his special right against the goods.

G. GILMORE, *supra* note 30, at 66.

185. L. JONES, *supra* note 181, at § 19.

186. *Id.* at § 8.

187. Because of the provisional nature of the mortgagee's title, parol evidence was always freely admissible on behalf of the debtor to show the debtor's overriding ownership interest in the goods.

A, the present owner, gives *B* . . . a bill of sale of personal property. Subsequently *A* alleges that the true transaction between himself and *B* was a loan secured by a mortgage

The courts have . . . shown themselves willing to listen to *A*'s story; the parol evidence rule has opened up like a leaky sieve to allow *A* to vary, contradict and explain his own deed or bill of sale.

G. GILMORE, *supra* note 30, at 48 (footnote omitted). At law, an absolute bill of sale under seal could not be shown by parol evidence to have been intended as a mortgage. See L. JONES, *supra* note 181, at § 21. However, in equity, clear and convincing parol evidence could turn a bill of sale into a mortgage. See *id.* at § 22; see, e.g., *Hill v. Scott*, 101 Vt. 356, 143 A. 276 (1928) (permitting evidence of an oral agreement in connection with a bill of sale under seal to show that the bill of sale was to be held as security). Unconstrained by such rigid divisions between law and equity, § 2-102 contains an identical rule: "[T]his Article . . . does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction." U.C.C. § 2-102.

188. "One of the sad truths about the Code is that its several articles were never coordinated as they should have been. The lack of coordination between Article 2 on sales and Article 9 on secured transactions is glaringly evident." Gilmore, *supra* note 90, at 628. The chief reporter for the entire Code project was Karl Llewellyn who, along with Soia Mentschikoff, the associate chief reporter for the project, drafted article 2. Allison Dunham and Grant Gilmore, as the chief and associate chief reporters respectively, drafted the secured transactions article. See Goodrich, *Forward*, UNIFORM COMMERCIAL CODE FINAL TEXT EDITION (1951); see also J. WHITE & R. SUMMERS, *supra* note 30, at 4.

189. An article 2 draft, substantially similar to the current version, was approved by the Code's sponsoring bodies in 1943. As late as 1948, however, the proposed secured transactions article (article 9) was fragmented. Tentative Draft No. 2—article VII of that

of coordination between these two projects. Uncertain about what was rightly theirs to regulate, the article 2 team included in its first drafts chattel security provisions that ultimately would be incorporated into article 9.¹⁹⁰

It quickly became clear, however, that title and security inter-

date, entitled "Secured Commercial Transactions"—dealt with inventory and accounts receivable financing as well as consignments of goods. See 5 UNIFORM COMMERCIAL CODE DRAFTS 127 (E. Kelly ed. 1984) [hereinafter U.C.C. DRAFTS]. The projected organization of the secured transactions article called for separate chapters dealing with consumer goods (I), farmers (II), and merchants and equipment (IV) as well as "other chapters on pledges and other security devices." *Id.* This plan was ultimately abandoned in favor of the unitary structure of the present article 9 which recognizes only two kinds of security "devices," namely, purchase money security interests and all other security interests, and distinguishes them by the collateral involved. See U.C.C. § 9-102 official comment 5.

190. The Uniform Revised Sales Act, offered by the article 2 drafters on April 27, 1944, as the sales chapter of the proposed Code, contained § 55, which gave a financing buyer a "lien" to the extent of his "enabling advances" to the seller. See 2 U.C.C. DRAFTS, *supra* note 189, at 5. Section 57 of this draft also defined "purchase" for purposes of the proposed sales chapter to include "taking by mortgage or pledge." *Id.* Section 2-403 of the proposed final draft of the Code still governed the priority between a buyer in the ordinary course of business and the secured party. See U.C.C. PROPOSED FINAL DRAFT, TEXT & COMMENTS ED. (1950), *reprinted in* 9 U.C.C. DRAFTS, *supra* note 189, at 255. According to the chairman of the Code's editorial board, the first Code draft, issued in May of 1949, was "tentative" and "obviously incomplete in many respects." Goodrich, *Foreword to U.C.C. (1949 Draft)*, *reprinted in* 7 U.C.C. DRAFTS, *supra* note 189, at 5. Section 2-102, the scope section of the 1949 article 2 draft, provided in part: "Unless otherwise explicitly provided: (a) This article is not applicable to any transaction intended to operate only by way of mortgage, pledge . . . or other security transaction." (Emphasis added).

Section 2-405 of the 1949 draft, the predecessor to the current § 2-403, was designed to be one of these "explicit" provisions. According to the drafters, it was "phrased and intended to be taken broadly enough to cover a contract for security transfer which happens to be cast in the form of an unconditional contract to sell or present sale." U.C.C. § 2-102 comment (1949 Draft), *reprinted in* 7 U.C.C. DRAFTS, *supra* note 189, at 62.

Section 2-405 provided in relevant part:

A purchaser of goods acquires all title which his transferor has or has power to transfer; and in particular a good faith purchaser for value who is not a pawnbroker and to whom goods have been delivered . . . acquires:

(a) good title if his transferor has a voidable title which has not been avoided at the time, including as "voidable" a title derived under a [fraudulently induced contract of sale]; and

(b) the title of both his transferor and of any prior purchaser from the transferor if the transferor has retained possession . . . ; and

(c) the title of both the transferor and of any person who has made delivery to the transferor on conditional sale if his transferor is a merchant who deals in goods of the kind.

U.C.C. § 2-405 (1949 Draft), *reprinted in* 7 U.C.C. DRAFTS, *supra* note 189, at 160. The 1949 draft's version of § 2-702 subjected the reclaiming credit seller to the "rights of a good faith purchaser for value under this Article (Section 2-405)." See *supra* note 184.

The current § 2-102 does not contain the prefatory language emphasized above.

ests were destined to be separate property interests in the new Code. At the outset, the article 2 drafting team rejected the term "title" as descriptive of the security interests that their new article would ultimately cover along with title. In the early article 2 drafts, the "title" to the financed goods was transferred to the buyer.¹⁹¹ The financing seller who sought to retain title to sold goods, the conditional seller of the common law, kept a ghost, a "security title" instead.¹⁹²

It also soon became clear that "security interests" and "title" were destined to be very different kinds of Code property claims. As the projects moved forward, the article 2 team took careful note of the emerging article 9 "security interest."¹⁹³ As it became the mainstay of article 9, the financing seller's "security title" faded under article 2.¹⁹⁴ Eventually, all references to "security title" in article 2 were scrapped in favor of the "security interest" that had become the core property claim of the new article 9.

In the completed Code, the jurisdictional lines were drawn. Separate articles governed outright transfers of title to goods and

References to secured transactions matters still linger, however, in the current official comments to § 2-403. See U.C.C. § 2-403 official comment 1.

191. See U.C.C. § 2-104 (1949 Draft), *reprinted in* 7 U.C.C. DRAFTS, *supra* note 189, at 65.

192. Section 2-401(2) of the 1949 Draft provided in relevant part that:

[T]itle passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of security title . . . and in particular despite any reservation of security title . . . by the bill of lading.

U.C.C. § 2-401(2) (1949 Draft), *reprinted in* 7 U.C.C. DRAFTS, *supra* note 189, at 155.

See also U.C.C. § 2-505 (1949 Draft), *reprinted in* 7 U.C.C. DRAFTS, *supra* note 189, at 177 (negotiable bill of lading procured by seller reserves "security title"). According to the official comment to this section:

The security title reserved to the seller . . . is restricted to securing payment or performance by the buyer and the seller is strictly limited in his disposition and control of the goods as against the buyer and third parties. The security interest, therefore, must be regarded as a means given to the seller to enforce his rights against the buyer which is unaffected by and in turn does not affect the location of title generally.

Id. § 2-505 official comment 1 (1949 Draft), *reprinted in* 7 U.C.C. DRAFTS, *supra* note 189, at 177.

193. See 10 U.C.C. DRAFTS, *supra* note 189, at 91, 183, 187, 191, 193, 237.

194. In the Proposed Final Draft of the Code, submitted on March 15, 1950, by the Editorial Board for approval, "security title" was no longer to be found in article 2. The term "security interest" appeared in all the relevant article 2 sections save one. See *id.* at 79-311; U.C.C. PROPOSED FINAL DRAFT, TEXT & COMMENTS ED. (1950). A seller who "reserved" title to delivered goods under § 2-401 was "limited" in his claim to "security for their price." See 10 U.C.C. DRAFTS, *supra* note 189, at 183. By 1952, when the Code was finally approved by the sponsoring bodies, "security interest" appeared uniformly throughout its goods articles.

secured transactions, which thrived on rights to goods. Only article 2 sellers and buyers held "title" to goods. Secured sellers and lenders held "security interests" in goods, something less than title. Any article 2 sale, even one in which the seller became a secured party, resulted in the transfer of the "title" to the goods to the buyer.¹⁹⁵

Two sets of rules protected the financial stake of the unpaid seller in the article 2 sale. He could bargain for an article 9 security interest in the sold goods either by executing an article 9 security agreement or by reserving "title" to the goods in the article 2 contract of sale.¹⁹⁶ In both cases, the buyer took title to the purchased goods and the seller ended up with the same "security interest" held by an article 9 counterpart. If the seller chose to sell goods without opting to retain a security interest in them, article 2 reclamation principles protected him.¹⁹⁷ Today, the distinctions that the Code makes between reclaiming sellers and secured parties are incorporated in the Bankruptcy Code.¹⁹⁸

Yet, given its original limited mandate, the new Code had not preempted the field of bargained-for property interests in goods. Because of the increasing commercial importance of leases and the unsettled nature of the law governing them, the Code's sponsors eventually approved a lease project.¹⁹⁹ This created another Code property claim to goods between a lessor and a lessee, the "leasehold interests."²⁰⁰

Like articles 2 and 9, article 2A suffered from a lack of coordina-

195. See U.C.C. §§ 2-106, 2-401.

196. See U.C.C. §§ 9-501 to -506 (describing secured party's rights and remedies under a security agreement); *id.* at § 2-401 (allowing the seller to reserve a security interest); *id.* at §§ 2-701 to -710 (seller's remedies).

197. See *id.* § 2-702(2), (3).

198. Section 546(c) of the Bankruptcy Code of 1978 subjects the trustee's claim to "any statutory or common law right of a seller of goods . . . to reclaim such goods if the debtor has received such goods while insolvent." 11 U.S.C. § 546(c) (1988). The references to "statutory" and "common law" reclamation rights were designed to cover § 2-702 and cash sale theories. See J. WHITE & R. SUMMERS, *supra* note 30, § 23-10; Sturm, *U.C.C. Section 2-702(2): An Unsecured Seller's Right to Reclaim Goods*, 9 N. ILL. L. REV. 299, 304-06 (1989).

199. Article 2A, a revision of the Uniform Personal Property Leasing Act, was approved by the Permanent Editorial Board of the Code in March of 1987. The reporter for article 2A was Ronald DeKoven. The final text of the article was approved by the Code's sponsors in August of that year. See U.C.C. § 2A-101 official comment.

200. See *id.* § 2A-103(1)(m). The "lessee" acquires from the "lessor" the rights to possession and use under the lease. See *id.* § 2A-103(1)(n),(p). But the lessor retains a "residual interest," whatever remains of the goods after the lease. See U.C.C. § 2A-103(1)(q).

tion and input during its drafting.²⁰¹ Still, when the article 2A drafting team set to work to fit the new lease article into the Code, the task at hand was much less imposing than the one confronting their predecessors. For unlike the seller and buyer of goods, and the mortgagee who held the goods as collateral, the lessee of the goods never held title to them.

Given the lessee's traditional yet restricted rights to exploit the goods through possession and use over a specified term, the lessee's article 2A property interest was destined to be something less than the "title" retained by the lessor and governed by article 2. Yet, because the lessee had these rights of exploitation, a lease would be more than the contingent article 9 "security interest," which the secured party could only enforce upon an agreed default. If a lease was neither a sale nor a security interest, it was something in between. It is hardly surprising then that the article 2A drafters borrowed liberally from articles 2 and 9 in creating article 2A.²⁰²

For ostensible title matters, the drafters looked more to article 2 than to article 9 and enhanced the rights of owners of goods even further.²⁰³ The result was an article even more restrictive in its protection of third parties than article 2. Under article 2A, a lessor, like

201. Article 2A was not thought out carefully as to whether it should conform conceptually to article 2 or 9, according to Harry Sigman, Esq., panelist, "The Emerging New UCC" A.L.I.-A.B.A. Conference September 7, 1989. Another panelist referred to the "small paid staff" and the absence of scholarly input during the article 2A drafting process. Moreover, article 2A, which was presented to the American Law Institute in "essentially complete form," was approved by a mail vote of the executive committee of the U.C.C. and the Council of A.L.I. and merely reported to the memberships of the two bodies. Under a new operating agreement effective in July 31, 1986, the Permanent Editorial Board will have more control over the Code drafting process. See Kripke, *Some Dissonant Notes about Article 2A*, 39 ALA. L. REV. 791, 794 (1988).

202. The product they created was admittedly flawed. "These existing Articles [2 and 9]. . . have certain imperfections revealed by the long experience since their adoption. Article 2A cannot overcome these imperfections but seeks to minimize their significance as applied to leases." Hazard, *Foreword*, U.C.C. article 2A. Among these imperfections are the article's voidable title provisions. Section 2A-304(1) is based on § 2-403. See U.C.C. § 2A-304(1) official comment. Although § 2A-304(1) is consistent with general Code ostensible title policy, it is certain to exacerbate the confusion among the Code's goods articles. On the one hand, it is inconsistent with *Samuels*. Section 2A-304(1) provides that "a lessor with voidable title has power to transfer a good leasehold interest to a good faith subsequent lessee for value." *Id.* § 2A-304(1) (emphasis added). The implication is that only lessees who actually rely on the lessor's ostensible title to the goods are protected from a reclaiming seller. On the other hand, it is inconsistent with § 2A-306(2), which seems to treat the defrauded article 2 seller as a "lien creditor" of the lessor who can avoid both the sale and the lease contract. Section 2A-103(1)(r) broadly defines a "lien" as an "interest" in goods that secures payment of a debt or performance of an obligation but that is not a "security interest." *Id.* § 2A-103(1)(r).

203. See *supra* notes 94-98 and accompanying text.

the reclaiming seller, need not file notice of his claim to protect it from secured creditors of his lessee.²⁰⁴ And if the lessee attempted to sell the leased good outright, the buyer will only take whatever rights to possession and use that the lessee bargained for under the lease.²⁰⁵

SUMMARY

Under today's Code, certain ownership secrets can be kept from secured parties. The lessor's unpublished title to leased goods is one example.²⁰⁶ The reclaiming seller's title claim should be another.²⁰⁷ Yet, fueled by the *In re Samuels* view that reclaiming sellers are article 2 secured parties, the trend has been to reduce these contending property claims to security interests, a process that dooms owners of goods to floating lienors of record.²⁰⁸

204. U.C.C. § 2A-101 official comment; *id.* at § 2A-301 official comment. But a lessor may file in accordance with § 9-408 to protect the claim in the event that a court ultimately concludes that it is a sham. See *infra* note 212 and accompanying text. The issue of whether to impose filing requirements on leases was a hotly contested one. See Mooney, *The Mystery & Myth of "Ostensible Ownership" and Article 9 Filing: A Critique of Proposals to Extend Filing Requirements to Leases*, 39 ALA. L. REV. 683, 685 (1988). Under the "meager statutory treatment" afforded by prior statutes and the common law, the true lessor was not required to file. Exceptions were South Carolina and Idaho, which required recording of livestock leases. See *id.* at 694 n.40. Some commentators contend that true leases should be filed. Professor Kripke for one, believes that there is "no distinction" between secured transactions and true leases, which he regards as a "continuum comprised of an infinite variety of transactions." Pigeonholing is therefore "artificial." Kripke, *Book Review*, 37 BUS. LAW. 723, 727 (1982). See also Jackson & Peters, *supra* note 53, at 947 (treating unconditional delivery of contract goods the same as goods delivered under a contractual reservation of title).

205. See U.C.C. § 2A-305, in which § 2-403 is most nearly replicated. Under this section, a lessee with a "voidable" leasehold interest has power to transfer only a "good leasehold interest" to a good faith buyer for value. By subsection (2), however, a "buyer in the ordinary course of business" from a lessee who is a merchant of goods of the kind involved, can take "all of the lessor's rights to the goods." *Id.* at § 2A-305(2). The drafters point out in their official comment that this rule is "consistent with existing case law that prohibits the bailee's transfer of title to a good faith purchaser for value under § 2-403(1)." In support, they approve *Rohweder v. Aberdeen Prod. Credit Ass'n*, 765 F.2d 109 (8th Cir. 1985). See *id.* at § 2A-305 official comment.

206. See *supra* text accompanying notes 103 and 104.

207. See U.C.C. § 2-702 (seller may reclaim any goods received by the buyer on credit).

208. The trend's impact has been felt in two areas. Courts still routinely struggle to distinguish between true leases and secured transactions. See Mooney, *Personal Property Leasing: A Challenge*, 36 BUS. LAW. 1605, 1610 (1981): "[A]s a group, [the cases] are hopelessly contradicting and confusing." Some pragmatists have even resorted to title concepts to resolve the issue. See T. BAIRD & D. JACKSON, *SECURITY INTERESTS IN PERSONAL PROPERTY* 93 (2d ed. 1987). In 1987, § 1-201(37), which offers guidelines to distinguish between secured transactions and leases, was revised. See also Harrell, *Sales Related Conflicts Between Articles 2 and 9*, 22 U.C.C. L.J. 134, 136 (1989) (arguing that when

The powerful taboos against title have convinced Code thinkers that the property claims asserted by reclaiming sellers and secured parties are identical.²⁰⁹ It is hardly surprising that the pragmatists feel frustrated by a lack of "firm guidance" from the Code's drafters about how to contend with these unpaid claimants to goods.²¹⁰ A couple of them have even made the wistful suggestion that "perhaps all of these conflicts should be resolved on the basis of the particular equities of the particular parties in the particular circumstances in which they find themselves."²¹¹

Because the prevailing view represses ownership concepts, it lacks perspective. Every transaction in goods, from the loan of a lawnmower among neighbors to a three-party equipment lease, can be said to involve financing aspects, an insight that was not lost on the Code's drafters when they formulated their new lease article.²¹² As its drafting history demonstrates, however, the Code was designed to establish distinctive property interests in goods, as molded by the contracts that govern them, to be used to place the various transactions involving them in their proper Code context.²¹³

Each Code property claim is as unique as the contract that governs it. Title claimants such as lessors and reclaiming sellers have more potent interests than lessees and secured parties. An owner's rights are far greater than the rights to possession and use held by the lessee and, a fortiori, to the contingent claim to goods held by the secured party. While an owner of goods must voluntarily relinquish ownership through contract or conduct before being deprived

conflicts arise between article 2 and article 9, the latter must yield to the competing sales-related provision).

Courts also have difficulty distinguishing true bailments from secured transactions where an owner of goods delivers them to a putative bailee who will either service the goods or transform them. The cases are irreconcilable. Compare *In re Sitkin Smelting & Refining, Inc.*, 639 F.2d 1213 (5th Cir. 1981) (Fifth Circuit upheld the bankruptcy court's finding of a bailment and thus Kodak could reclaim film from Sitkin after Sitkin's bankruptcy, without being subject to the security interest of C.I.T., a secured financier of Sitkin) with *Kinetics Tech. Intern Corp. v. Fourth Nat'l Bank*, 705 F.2d 397 (1983) (Tenth Circuit rejected Kinetics' bailment theory, and accordingly found that a bank with a secured financier's interest was secured by the goods).

209. See, e.g., T. BAIRD & D. JACKSON, *supra* note 208, at 740-42.

210. See Jackson & Peters, *supra* note 53, at 947.

211. *Id.*

212. In referring to the tests that the courts used to distinguish true leases from secured transactions, the article 2A drafters said, "most of these criteria [sale and loan factors] are as applicable to true leases as to security interests." U.C.C. § 1-201(37) official comment (1987 proposed amendment).

213. From the Code's adoption in 1952 to the present, "sales" have been separated from "secured transactions."

of the goods,²¹⁴ a secured party need not.²¹⁵ At one extreme, gap-filler provisions stand by to flesh out the sketchy accord reached in the typical article 2 sale.²¹⁶ At the other, article 9 is almost devoid of such gap-filler provisions. A security agreement is thus more likely to result from complex negotiations in which each party is probably represented by counsel; a far cry from the ordinary sale that may be initiated with an unsolicited purchase order sent through the mail.²¹⁷ Indeed, while the bread-and-butter matter of when default occurs under a security agreement must be spelled out explicitly, the parties to a sales contract may not even broach the fundamental issue of payment.²¹⁸

Even worse, with its unstated premise that unsecured sellers of goods cannot trust their buyers, the prevailing view burdens the relationship between the parties to the article 2 sale. Carried to its logical conclusion, it requires that unsecured sellers involve bankers to protect their financial stake to sold goods²¹⁹ by insisting that their cash buyers produce bank checks and that their credit buyers arrange for bank credit. The informal contract formation principles of article 2 were, however, designed to promote sales without the intervention of bankers.²²⁰ Ordinary checks and open credit terms, backed up by reclamation principles, are routine ways of paying for goods.²²¹ If sales customarily were transacted with bankers, transac-

214. See *supra* note 101. See also *Brodie Hotel Supply, Inc. v. United States*, 431 F.2d 1316 (9th Cir. 1970) ("rights" to which security interest could attach arose from date of actual sale, not earlier possession by buyer).

215. See, e.g., U.C.C. § 9-301 (citing the classes of persons who take priority over an unperfected security interest).

216. See A. KRONMAN & R. POSNER, *THE ECONOMICS OF CONTRACT LAW* 4 (1979) (stating that many rules of contract law are "simply specifications of the consequences of some contingency for which the contract makes no express provision").

217. Given its lineage, not surprisingly, the lease is somewhere in between. "The lease is closer in spirit and form to the sale of goods than to the creation of a security interest. While parties to a lease are sometimes represented by counsel and their agreement is often reduced to writing . . . the drafting committee concluded that Article 2 was the appropriate statutory analogue." U.C.C. § 2A-101 official comment.

218. See *id.* § 2-305 (open price term).

219. See McDonnell, *The Floating Lienor as Good Faith Purchaser*, 50 S. CAL. L. REV. 429, 460 (1977): "[The *Samuels*] result allows a floating lienor to prevail over a cash seller who has not been paid and who has no realistic means to protect his interests under the Code." *Id.*

220. This is evident from the provisions allowing the seller to reserve a security interest, § 2-401, the reclamation principles found in § 2-702, and the seller's remedies in general under §§ 2-703 to -710.

221. "Millions of dollars worth of goods are sold each year on the strength of the buyer's credit." R. NORDSTROM, *supra* note 43, § 165, at 498. See also D. EPSTEIN, T. MARTIN, W. HENNING & S. NICKLES, *BASIC UNIFORM COMMERCIAL CODE* 250 (3d ed. 1988) (most sales made on open credit). A security agreement is "a kind of agreement

tion costs would increase—just as they would if unsecured cash or credit sellers were required to give record notice.

The Code does not demand that its ownership claims be published to protect them from creditors.²²² In fact, the argument that lessors should be required to publish notice of their ownership claims to protect them from secured parties was pressed during the article 2A drafting process and rejected by the Code's sponsors.²²³ Merchants have sold goods for centuries without written contracts, bankers, or record notice. The tradition was enthusiastically endorsed for today by the Code's drafters.

CONCLUSION

The original Code did not embody the revolution in sales law that its drafters envisioned. A massive dose of contract was not able to ransom it from common-law title. The changes in chattel security law, however, were fundamental. Myriad financing devices were dismantled²²⁴ to give way to the all-encompassing article 9 "secured transaction" whose core claim, the "security interest," was no longer identical to ownership.

The intentions of Karl Llewellyn, the esteemed reporter for the article 2 project, did not go unchallenged. As the Code project was launched, another eminent scholar, Samuel Williston, warned that the rejection of title, the most "fundamental feature" of the law of property, would be disastrous.²²⁵

Someone must have been listening. Title principles are still firmly in place, if not in sight, as the framework for today's commerce in goods.

that will not have remotely crossed [the seller and buyer's] minds." Jackson & Peters, *supra* note 53, at 918.

222. Notice of a "sale on approval" need not be filed under § 2-326. Under this Code bailment, "goods held on approval are not subject to the claims of the buyer's creditors until acceptance." U.C.C. § 2-326(2). According to § 3-327(1)(a), "title" does not pass to the buyer until then. *Compare id.* § 2-327(2) (title passes in "sale or return").

223. *See id.* § 2A-101 official comment.

224. *See* U.C.C. § 9-101 official comment.

225. Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 569 (1950).